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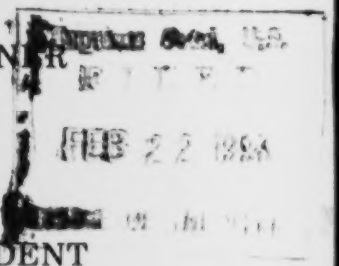
In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN P. WHITLEY, WARDEN
PETITIONER

VERSUS

ALVIN SCOTT LOYD
RESPONDENT



PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) In light of mitigating evidence, should habeas petitioner's after the fact new psychiatric opinion concerning previously disclosed brain disorder constitute "new evidence" which would warrant habeas relief, particularly in view of State and Federal District Court factual findings to the contrary?

(2) Given statements made to his attorney at the time, should subsequent statements by a death row inmate that are inconsistent, be considered "new evidence" for purposes of determining whether defendant was afforded effective assistance of counsel?

(3) Are statements to a physician which are inconsistent with prior sworn medical testimony, competent evidence on which to rule that there is "new evidence" of mental defect?

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A: STATEMENT OF FACTS

On the evening of April 26, 1981, Tina Giovanetti and her three year old daughter were walking home after attending a fair in Terrebonne Parish. They accepted defendant's offer of a ride in the pick-up truck. When he reached the Giovanetti home, the defendant asked if he could come in. The woman refused his request and stepped out of the truck. Before she could remove her daughter, however, the defendant drove off with the little girl inside the cab. The defendant traveled to the Mississippi River, crossed into St. John the Baptist parish on the Lutcher ferry, and continued down a desolate dirt road near a pipeline. At a remote spot, he raped the child, drowned her in a ditch, carried her body into an adjacent swamp, and covered it with leaves. Ms. Giovanetti reported the kidnapping of her dauther to the police and described the offender and his truck. Armed with this and other information, the St. John the Baptist Parish Police contacted the defendant at his home early the next morning and requested that he accompany them to the sheriff's office. He willingly got dressed and drove his truck to the station house. Interrogation and other events ultimately culminated in the defendant leading the Sheriff to the victim's body and giving a written confession. *State v. Loyd*, 425 So. 2d 721 (La. 1982).

B: STATEMENT OF THE CASE

Alvin Scott Loyd was indicted for First Degree Murder, R. S. 14:30, by a St. John the Baptist Parish Grand Jury. After a bifurcated trial, the jury unanimously found the defendant guilty and recommended the death penalty. On review, the Supreme Court of Louisiana affirmed the conviction but reversed and vacated the sentence because of error in the trial judge's instructions to the Jury, *State v. Loyd*, 459 So. 2d 498 (La. 1984).

Following a new sentencing hearing which began on May 6, 1985, another jury recommended the death penalty, finding the offense was committed in an especially heinous, atrocious or cruel manner and the offender was engaged in the perpetration or attempted perpetration of an aggravated rape and aggravated kidnapping. The Louisiana Supreme Court affirmed this sentence.

Writs of Certiorari were denied by the Louisiana Supreme Court. *State v. Loyd*, 107 S. Ct. 1984, rehearing denied 107 S. Ct. 3244. A state evidentiary hearing was ordered by the Supreme Court. The evidentiary hearing occurred in January, 1988. Based on the findings of the evidentiary hearing, the Court found no basis for the stay of execution. Writs were taken to the Louisiana Supreme Court and were denied. Petitioner having exhausted all state court remedies filed a petition for Post-Conviction Relief, Writ of Habeas Corpus, Request for Evidentiary Hearing and a Stay of Execution with the United States District Court for the Eastern District of Louisiana File Number 89-1389D. On July 27, 1989, the District Court found that none of Petitioner's constitutional rights were violated and denied the relief sought by Loyd. The District Court ordered that Loyd's Stay of Execution remain in effect pending appeal. On appeal, U. S. Fifth Circuit Court of Appeal remanded the matter back to the District Court ruling that the District Court did not give proper deference to the State Court's finding of fact as required by 28 U. S. C. 2254 (d). The District Court reviewed the state habeas court's findings and again held that the performance of counsel was not deficient and did not prejudice Loyd. The U. S. Fifth Circuit Court of Appeal then reversed the Judgment of the District Court and remanded, directing the State of Louisiana, at its own option, to sentence Loyd to life imprisonment or to retry the sentencing phase of his trial. Loyd applied for a re-hearing on the other issues

presented, which rehearing was denied in U. S. Fifth Circuit Court of Appeal on November 23, 1992.

SUMMARY OF ARGUMENT

Please take notice that John P. Whitley, Warden, Louisiana State Penitentiary, Respondent-Appellee in the above-captioned matter (Appellee), through undersigned counsel, hereby petitions the Court for Writ of Certiorari pursuant to Rule 10 of the Supreme Court Rules.

Petitioner requests writs for the reason that the Fifth Circuit reached its decision based on its analysis of "New Testimony and Evidence", most of which is not new, not competent, or both. The only really new matter consists of psychiatric opinion based upon after the fact alleged clinical interviews which flatly contradict appellant's own testimony at the time of the second sentencing trial. To the extent that "new" psychiatric opinion has been formed on the basis of inconsistent clinical interviews and hearsay, the Fifth Circuit would reject the jury function in the sentencing phase and the judicial function in the post-conviction relief phase on the basis of speculation.

The record is quite clear that a number of mitigating factors were presented at the sentencing phase, including evidence of appellant having worked long hours shortly before the crime, having consumed alcoholic beverages, having been physically abused by his father as a child, suffering financial disappointment. In addition, the defense called Dr. Cox who was appellant's treating physician at the Feliciana Facility for four months and who testified to the effects of the various factors or circumstances.

Dr. Cox's opinions were partly based on psychological tests administered while appellant was at

Feliciana. These same tests were provided appellant's new physicians and psychologists for the state evidentiary hearing. While the data was not disputed, the interpretations of data were. The new doctors rendered various opinions based upon the old data, newly interpreted, and their own clinical interviews with appellant. It should also be noted that in at least one instance, significant background information was provided by appellant's habeas counsel. All of the information provided the new doctors, with exception of the Feliciana tests and reports, comes several years after the crime, from sources providing hearsay testimony or first-hand knowledge sheltered from cross-examination so that the reviewing Court cannot discern the inconsistencies.

Regrettably the Fifth Circuit has elected to characterize as "new evidence" testimony which is only new opinion, based on essentially the same information presented to the sentencing jury. In *Harris v. Vasquez,* 949 F 2d 1497 (9th Cir. 1990), cert. denied 112 S. Ct. 1275 (1990), cert. denied 112 S. Ct. 1275 (1992), the appellate court rejected a habeas petitioner's claim that new psychiatric opinion entitled him to habeas corpus relief. In the view of that Court, new psychiatric opinion was not newly discovered evidence warranting relief. The Fifth Circuit seeks to broaden the range of ineffective assistance claims by finding that the *Strickland* tests are not met unless counsel located a psychiatrist or psychologist to testify according to the defendant's wishes. *Roach v. Martin,* 757 F. 2d 1462 (4th Cir. 1985) held that counsel had no affirmative duty to find a psychiatrist who would testify according to defendant's wishes. *Loyd v. Whitley* suggests otherwise.

Additionally, this Honorable Court should consider *Adams v. Aiken,* 965 F. 2d 1306, (4th Cir. 1992), where

a habeas petitioner was found to not have been denied effective assistance of counsel at sentencing, when trial counsel failed to request a mental evaluation during the second trial where the evaluation would have been inconslusive evidence of petitioner's mental condition at the time of the commission of the crime; and *Prejean v. Smith*, 889 F. 2d 1391, cert. denied 110 S. Ct. 1836, 108 L. Ed. 2d 964 (5th Cir. 1989), where defense counsel's alleged failure to present evidence that defendant suffered damage to front and parietal lobes of his brain which rendered him unable to control his violent impulses did not constitute ineffective assistance of counsel in sentencing phase of capital murder prosecution, where trial counsel did present sufficient evidence of defendant's age and mental ability to allow the jury to consider those mitigating circumstances.

Significantly, Drs. Honor and Scanlon relied on Loyd's "self-report", some eight years after the crime, to opine that he could not discern right from wrong at the time of the crime. Neither of these gentlemen were present immediately after appellant was arrested to observe how he led police to the dead child's body. Neither could explain appellant's ability to pass a field sobriety test, carry on a conversation with a police officer and recall it quite well in view of delusions and hallucinations appellant reported to them several years after the crime.

Honor also offered an opinion that appellant was not depressed immediately after the crime but that his symptoms reflected his general psychological state. This is speculation and/or opinion, not evidence. Similarly, there is a suggestion or opinion that Loyd's behavior in murdering the child was the result of organic brain damage. No such definite diagnosis can be made, however.

Certain new opinion testimony is based on information that appellant withheld from his previous attorneys. For example, Randy Lewis testified at the evidentiary hearing that he suspected sexual abuse of appellant but appellant denied it. Dr. Honor claims to have received reports of childhood sexual abuse from appellant, his mother and sister.

Loyd's own version of the day of the crime has apparently become more lucid so that he has related to the new doctors that he consumned as many as twenty-four beers whereas under cross-examination at the sentencing he admitted drinking from eight to eighteen over the day. He could remember detail in his confession but not readily at the sentencing hearing, and then apparently quite well with the new doctors. Loyd related to them, apparently, his intent to kill the child and the notion that he could kill her by raping her.

Finally, the Fifth Circuit has totally ignored the fact that trial counsel hired Dr. C. B. Scrignar to evaluate appellant. Dr. Scrignar's testimony was not presented because it was adverse to appellant's defense. This is when Dr. Cox was called to testify at the sentencing hearing, and reviewed much the same factors that have fueled flights of fancy in the new doctors.

APPLICABLE LAW

A claim of ineffectiveness of counsel is reviewed under the now familiar test of *Strickland v. Washington*, 466 S. U. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984);

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel

> was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This required showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

If defendant challenges a death sentence on ground of ineffective assistance of counsel, defendant must show that there is a reasonble probability that absent counsel's errors, the sentencer, including appellate court to extent that it may weigh evidence, would have concluded that balance of aggravating and mitigating circumstances did not warrant imposition of death sentence. *Whitely v. Bair,* 802 F. 2d 1487 (4th Cir. 1986) cert. denied 107 S. Ct. 1618.

> "If counsel's performance was outside the range of competence demanded of attorneys in criminal cases, the defendant must then establish that any deficiencies in counsel's performance were actually prejudicial to the defense. See *Strickland v. Washington,* 466 U. S. 688 at 691, 104 S. Ct. 2052, 1066-67, 80 L. Ed. 2d 764; "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Such a showing requires the defendant to establish that there is reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Id. at 694, 104 S. Ct. at 2068. Thus, if a defendant challenges a death sentence such as the one at issue is this case, the defendant must

> show that there is a reasonable probability that absent counsel's errors, the sentencer, including appellate court to the extent if may weigh evidence, would have concluded that the balance of aggravating and mitigating circumstance did not warrant the imposition of a death sentence. Id. at 695, 104 S. Ct. at 2068-69, *State v. Bair,* supra. at 1493.

Federal courts in habeas proceedings are required to grant a presumption of correctness to a state court's explicit findings of fact if supported by the record. 28 U. S. C. 22254 (d). See also *Marshall v. Lonberger,* 459 U. S. 422, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983); *McCoy v. Lynaugh,* 874 F. 2d 954 (5th Cir. 1989). Although the ultimate question of whether of not counsel's performance was deficient is a mixed question of law and fact, state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of section 2254 (d). *Strickland,* 104 S. Ct. 2070; *Smith v. Estelle,* 711 F. 2d 677 (5th Cir. 1983), cert. denied, 466 U. S. 906, 104 S. C. 1685, 80 L. Ed. 2d 159 (1984).

In reviewing this very case the Fifth Circuit has reasserted the deference which must be afforded the state courts findings of fact, *Loyd v. Smith,* Note 89-3589 p. 3707 U. S. 5th Cir. (April 18, 1990):

> "The Supreme Court, in *Sumner v. Mata,* 449 U. S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981), has indicated that when a federal court on habeas review disregards a state court's factual findings, the federal court must indicate which statutory circumstance enumerated in section 2254 (d) is present which allows the court to abandon the presumption of correctness. The high degree of deference to state court findings

> required by *Sumner* mandates that a federal court must 'more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record.' *Marshall*, 103 S. Ct. at 850. This high standard stems from the considerations of comity that militate against federal courts reviewing fact findings with a less deferential standard."

THE STATE COURTS FINDINGS OF FACT

The State court in its finding after an extensive evidentiary hearing concluded:

> "Again as stated in *Strickland*, supra. The issue to be decided is whether there is a reasonble probability that at least one of the jurors hearing this evidence "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' It is this Court's opinion that no juror would have so concluded. The enormity of the crime committed was so great that any mental disease or defect, short of legal insanity, would simply not, in this Court's opinion, have tipped the balance in any juror's mind so as not to warrant a sentence of death." (Reasons for Ruling Judgment April 14, 1988)

The State Court evaluated the new psychiatric testimony presented by petitioner and concluded:

> The court acknowledges that the evidence presented at this hearing taken alone, would appear to raise serious questions as to petitioners mental competence, however, petitioner's experts based their opinions on a number of hypothetical

facts which in the Court's opinion were never established. First, the suggestion that petitioner may have been drugged at the bar is simple speculation; second, the record does not show that petitioner had worked unusually long hours in excessive heat, to which he was not accustomed, in the days immediately preceding the crime; and third, there was not evidence to indicate that he had suffered a concussion during the boat ride on the afternoon before the crime. Thus, the opinions of Drs. Honor, Scanlon and Sanchez, to the extent that they were based on these assumptions, would probably have had no influence on the jury's assessment of petitioner's psychological condition on the night of the crime. Similarly, while there was general agreement by the experts that petitioner exhibits clinical signs of some physical irregularity in his frontal lobe brain function, no more than a suspicion was indicated, even by his own experts, that this irregularity explained or excused the crime." (Id. at pp 9-10)

The testimony of Loyd's psychological and psychiatric witnesses presented at the evidentiary hearing on incompetent counsel even if plausible— would not have changed the jury verdict. The State Court concluded:

"THE ENORMITY OF THE CRIME COMMITTED WAS SO GREAT THAT ANY MENTAL DISEASE OR DEFECT, SHORT OF LEGAL INSANITY, WOULD SIMPLY NOT IN THIS COURT'S OPINION, HAVE TIPPED THE BALANCE IN ANY JURORS MIND SO AS TO NOT WARRANT A SENTENCE OF DEATH." (Id. at p. 11)

The state court finding of fact controls unless the court concluded that the state court findings lacked even "fair support" in the record. See *Sumner,* supra. The state court finding of fact are supported by the record in this case.

LEGAL ARGUMENT

The state court in this case was called upon to determine whether there was a "reasonable probability" that had the jury heard the petitioners new psychological evidence presented at the evidentiary hearing, at least one of the jurors would have reached a different verdict. Or as paraphrased in the *Strickland* opinion, can the court be confident that at least one juror's verdict would have not been different had this new evidence been presented. The State District Court Judge assumed the role of a hypothetical juror and, after hearing the additional psychiatric evidence, determined that a sentence of death is proper in this case. The Federal Court's review is limited to determining whether the state court finding lacked even "fair support" in the record. In its treatment of the state court's factual finding, the federal law 28 U. S. C. 2254 (d) establishes a presumption of correctness for "a determination after a hearing on the merits of a factual issue made by a state court of competent jurisdiction in a proceeding to which the application for the writ and the state or an officer or agent thereof were parties, evidenced by reliable finding, written opinion and other reliable and adequate written indicia... See *Marshall v. Lonberger,* 103 S. Ct. 843, 459 U. S. 1314, 74 L. Ed. 2d 924 (1983).

The state district court ruled on the validity of petitioners new psychological evidence and based on the record determined that the hypothetical assumption on which Dr. Scanlon, Dr. Honor and Dr. Sanchez relied were not proven

and therefore not reliable.

It is also important to note that these Doctors examined petitioner seven years after he committed the crime after having spent five years on death row without considering the effect such incarceration had on petitioner's mental state.

The record established more than adequate support for the state court decision that petitioner was not prejudiced. The lack of prejudice is supported by a number of factors.

A) Many of the facts on which Dr. Honor and Dr. Scanlon based their opinions are not supported by the record.

B) Psychological evidence of mitigation was presented by petitioner's counsel.

C) Petitioner withheld critical information from his attorneys.

D) Physical testing did not support Dr. Honor's and Dr. Scanlon's theory of brain disfunction.

A) MANY OF THE FACTS ON WHICH DR. HONOR AND DR. SCANLON BASE THEIR OPINION ARE NOT SUPPORTED BY THE RECORD

When questioned about the factors which caused Mr. Loyd's alleged diminished capacity Dr. Honor and Dr. Scanlon both agree as to the contributing factors:

1) Recent head trauma

2) Alcohol consumption

3) Sleep deprivation

4) Possible drug ingestion

5) Exposure to heat

The testimony of independent fact witnesses does not support the existence of all five factors and seriously challenges the magnitude of others.

Dr. Honor and Dr. Scanlon believe that Loyd suffered a head trauma prior to the murder while riding on a boat. Brenda Goode Carter, who was on the boat, establishes that Loyd did not suffer a head trauma.

QUESTION:"....did he [Loyd] ever fall?"

ANSWER:"No, he didn't fall. " (Second Sentencing trial Transcript p. 252 lines 9-11 Testimony of Brenda Goode Carter)

Dr. Honor's testimony and opinion is based on Loyd's consuming vast amounts of alcohol- in excess of 24 cans of beer-and that this amount of alcohol contributed to Loyd's impairment.

Mr. Albert Poche, Sr. however testified that when Loyd left the camp he was not drunk.

QUESTION:...What condition did he [Loyd] appear to be in when you last saw him?"

ANSWER: "... When he got ready to leave he wasn't drunk or anything like that...but he was pretty lively," (Second Sentencing Trial Testimony-Albert Poche, Sr. p. 200 line 27-28 p. 201 line 1-5)

Mr. Albert Poche, Jr. stated he saw Loyd drink only one beer while at the camp and some wine. (Evidentiary Hearing-January 21, 1988, p. 308 line 20)

While at the bar Loyd consumed an additional beer. (id. p. 224, line 20) He played pool with Poche and Loyd won. Brenda Goode Carter testified that Loyd did not seem intoxicated.

Dr. Honor testified that if the amount of alcohol was around a six pack and not a case of beer it would affect his opinion.

QUESTION: "If the record in this case indicated that Mr. Loyd consumed a six pack of alcohol over the six hour, six hour period of time prior to the crime, would that change your opinion?"

DR. HONOR:

"....Yes. I think it would." (Evidentiary Hear ing Transcript p. 457 line 2-9)

Regarding sleep deprivation and heat exposure the trial record establishes that Loyd worked only eight hours overtime during the entire week ending the day before his trip to Mr. Poche's camp preceding the murder. Loyd slept at home Saturday night and was obviously rested enough to visit his friends camp.

In assessing possible prejudice attributable to not called Dr. Honor and Dr. Scanlon it is important to consider the adverse effects their testimony would generate for petitioner. Consider Dr. Honor's description of Loyd's decision to murder his victim.

DR. HONOR:

"The child is crying. It's at this time that he

> [Loyd] decides that the only way that he can get rid of the threat is by getting rid of the child. And that's the point that which seems that there was an intent to murder the child. And at that point he engaged in those behaviors that were aimed at ridding himself of the child which really embodied the threat at that particular time. (Evidentiary hearing Transcript- p. 407 line 19-27 and p. 408 line 1-3)

Dr. Honor expects the jury to believe that Loyd had trouble making decisions and therefore he should not have been expected to make a good decision when it came to ridding himself of the child.

The record is devoid of any evidence that Loyd was given illegal drugs. When asked by petitioner's lawyer the question Mr. Poche responded:

QUESTION:

> "Do you know whether at the Dulac Bar someone put a drug in Scott Loyd's drink?"

ANSWER:

> "Definitely not." (Evidentiary Hearing Transcript- January 21, 1988, p. 316 line 18-21)

B) EVIDENCE OF MITIGATION WAS PRESENTED

Despite Loyd's assertion to the contrary, psychological evidence of mitigation was presented by his counsel during his sentencing trial. Petitioner's counsel conferred with, subpoenaed and called as a witness at the sentencing trial Dr. Cox, the only psychiatrist that actually treated Loyd. Dr. Cox was also, "the only psychiatrist in Louisiana board certified in Forensic Psychiatry." (Trial Transcript- 1985, p. 214)

Mr. Allison, lead counsel for the petitioner prior to second sentencing trial, conferred with Dr. Cox on the telephone, set a number of appointments with Dr. Cox and consulted with Dr. Cox prior to Dr. Cox's testimony.

ALLISON:

> "In my conversation with Dr. Cox before he testified we talked a whole lot about the impact upon an individual being raised in a home where alcoholism was prevalent. And where a child was subject to being abused by the alcoholic parent and whether that alone could lead to the kind of offense that Alvin had been convicted of ..." (Evidentiary Hearing Transcript- January 20, 1988, p. 50 line 25-27 and p. 51 line 1-7)

Dr. Cox interviewed Loyd more than half a dozen times, not as an examiner for the court or the District Attorney's Office, but as a treating psychiatrist. Equipped with that information, Mr. Allison solicited the following testimony from Dr. Cox to support his case of mitigation.

DR. COX:

> "If Mr. Loyd did in fact commit the offense the probable etiology of the crime was as follows: Mr. Loyd was himself a victim of child abuse and he had a very poor model for adult masculine behavior. He was not able to integrate the antisocial patterns of behavior he learned from his father with the excessively moralistic standards he was taught by his mother. One consequence of this confusion was that he had not obtained a stable adult sexual adjustment. And another consequence was that he developed a pattern of substance abuse. (Trial Transcript- May 9, 1985, p. 204 line 16-26)

"I think there are certain things that child abuse predispose people to do. It can predispose problems with sexual adjustment, yes, sir." (Trial Transcript- May 9, 1985, p. 206 line 4-6)

QUESTION:

"On the day of his crime, the day of the crime his intoxication rendered his inhibitions ineffective. Apparently he committed the crime cognizant of the wrongness of it but unwilling or unable to stop himself." Is, that sentence there, is that consistent with Mr. Loyd's personality and makeup as you understand it?" (Trial Transcript- May 9,. 1985, p. 206 line 19-25)

DR. COX:

"Yes, Sir. That would be consistent." (Trial Transcript- May 9, 1985, p. 206 line 26)

QUESTION:

"Later overwhelmed by horror over his actions he avoided memory of the events." Is that also consistent?" Trial Transcript- May 9, 1985, p. 206 line 27-28)

DR. COX:

"Yes, Sir." (Trial Transcript' May 9, 1985, p. 206 line 29)

QUESTION:

"Doctor, I apologize for the interruption. Let me read that to you, "In general, Mr. Loyd is a gentle and compliant person, he tends to control his anger and hostility. since he does not permit himself to express aggressive behavior," excuse me, "aggressive feelings the danger exists that they might build up to an uncontrollable level and be discharged ex-

plosively. Do you agree with those statements?" (Trial Transcript- May 9, 1985, p. 207 line 11-19)

DR. COX:

"Yes, Sir. As I indicated earlier our observations of Mr. Loyd at the institution were that he was a gentle and compliant person while there. And I think it's true, as with most of us, that if anger builds up there's always a risk that we can explode." (Trial Transcript - May 9, 1985, p. 207 line 20-25)

DR COX:

"I think that abuse of a person as a child predisposes that a person as an adult to be violent, abusive towards others. Either his own children, or other people with whom they might come in contact. I have done many evaluations for the Court. And I have found in I think a very high percentage of people who commit violent acts that they do have a history of abuse as children. That's been my experience." (Trial Transcript - May 9, 1985, p. 208 line 15-23)

QUESTION:

"Mr. Loyd's particular case was there—Excuse me. Let me, let me collect my thoughts here a moment, I'm sorry. In Mr. Loyd's case the history included child abuse and it also included an inability to express his hostility." (Trial Transcript - May 9, 1985, p. 208 line 24-28)

QUESTION:

'Now, what happens to a person who continues to repress and, and close in, hold in these, these emotions?" (Trial Transcript - May 9, 1985, p. 209 line 19-21)

DR. COX:

"Usually trouble occurs. They explode *sometimes and have* an outburst of anger and destructiveness. Sometimes they become depressed. Sometimes they engage in the abuse of drugs and alcohol as a way to try to neutralize or make themselves feel better." (Trial Transcript - May 9, 1985, p. 209 line 22-27)

QUESTION:

"Is it fair to say that a person like this is kind of like a time bomb—?" (Trial Transcript - May 9, 1985, p. 210 line 1-2)

DR. COX:

"Yes, Sir." (Trial Transcript - May 9, 1985, p. 210 line 3)

QUESTION:

"Doctor, in a person like Alvin Scott Loyd who you said was kind of like a time bomb waiting to, to, or I said and you agreed, that he was kind of like a time bomb waiting to go off, what kind of stimulus would trigger his going off, blowing up?" (Trial Transcript - May 9, 1985, p. 212 line 14-18)

DR. COX:

"Different things. Of course, stress, pressure, substance abuse such as alcohol, certain drugs we know predispose people to do things." (Trial Transcript - May 9, 1985, p. 212 line 19-21)

QUESTION:

"Now, if a, if a person has these personality characteristics and then is experiencing this stimulus, whatever it may be, whether it be drugs or alcohol, sleep deprivation, or some

other kind of stress, or combination of those, is it, is he apt to lose his ability to control these impulses?" (Trial Transcript - May 9, 1985, p. 213 line 18-23)

DR. COX:

"It's a possibility, yes, Sir." (Trial Transcript - May 9, 1985, p. 215 line 25)

QUESTION:

"Would that indicate to you then Doctor, that there had to be some kind of extraordinary precipitating cause, something that he didn't meet in the other twenty-five years of his life?" (Trial Transcript - May 9, 1985, p. 215 line 16-29)

DR. COX:

"There had to be something going on that was unusual." (Trial Transcript - May 9, 1985)

In addition to Dr. Cox, Mr. Allison and Mr. Hackman called numerous lay witnesses to establish the following facts to support mitigating circumstances:

1) family background

2) prior physical abuse

3) stress

4) physical exhaustion

5) influence of alcohol

C) APPELLANT WITHHELD INFORMATION FROM HIS ORIGINAL ATTORNEYS

A contributing factor to trial counsel's alleged weak

performance was the fact the petitioner withheld critical information. Petitioner did not provide trial counsel with facts that he now is providing his counsel and experts which diminished their ability to adequately present evidence of psychiatric mitigation. Mr. Lewis, petitioner's counsel, during the first and second trial repeatedly asked petitioner to identify occurrences during his life which would assist counsel.

QUESTION:

> "And during the counsel of your interviews with Mr. Loyd, did you request of him any information which would help mitigate this crime?" (evidentiary Hearing Transcript - January 20, 1988, pp. 204 line 5-8)

MR. LEWIS:

> "We went down through Scotts' past history with him whether he had any prior criminal records. Whether he was honorably or dishonorably discharged from the service. What branch of the service he was in. Whether or not— what kind of home life he had. How he was treated by his parents. Whether he had any, whether he was ever abused as a child. Scotty, I might say doesn't give us very much. We got most of things about Scottys' history from his mother or other relatives." (Evidentiary Hearing p. 215 line 5-17)

QUESTION:

> "Did you request of him any and all information which he could provide you with regard to any childhood abuses which he encountered?" (Evidentiary Hearing Transcript — January 20, 1988, p. 218 line 22-25)

MR. LEWIS:

"Gordon and I both suspected that, you know, inotherwords, we knew that from statistics that people who abuse children are generally as a child have been abused children themselves. So, you know, it was natural for us to make inquiries as to whether or not he had been an abused child. And we did, we did not find anything from any of his relatives or him that indicated that he was a sexually abused child. We did find out that he was an abused child such as, inotherwords his father was an alcoholic. His father beat him. His father would bring him to bars with him and leave him in the car and sometimes give him liquor as a child. We found those things out. And those things were argued to the jury as mitigating circumstances. We did not find any facts from any of the relatives or from Scott himself that indicated that he had been sexually abused as a child which I believe that was my belief. Okay. I believe all along that he, you know, that he must have been sexually abused or something in order to commit that kind of crime. But there was no, nothing that Gordon and I could find from his relatives or his Moma or him, even himself to indicate that." (Evidentiary Hearing p. 219 line 4-27 and p. 220 line 1-8)

QUESTION:

"And you actively sought that type of information?" (Evidentiary Hearing p. 220 line 9-12)

MR. LEWIS:

"Of course." (Evidentiary Hearing p. 220 line 11)

QUESTION:

> "And none of the forthcoming from either the defendant or his family?" (Evidentiary Hearing p. 220 line 12-13)

MR. LEWIS:

> "No" (Evidentiary Hearing Transcript—January 20, 1988, p. 220 line 14)

While counsel has a duty to investigate, that duty is not unlimited. When a defendant gives counsel reason to believe pursuing certain limits of investigation would be fruitless, counsel's failure to pursue these investigations may not later be challenged as unreasonable. *Strickland v. Washington,* supra., *Mulligan v. Kemp,* 771 F. 2d 1436 (11th Cir. 1985), *Tucker v. Kemp,* 776 F. 2d 1487 (11th Cir. 1985), *Whitley v. Blair,* 802 F. 2d 1487 (4th Cir. 1986), *Clanton v. Blair,* 826 F. 2d 1354 (4th Cir. 1987) amd *Gray v. Lucas,* 677 F. 2d 1086 (5th Cir. 1982). Now years after his trial, petitioner asserts evidence of mitigation such as sexual abuse and psychotic episodes which he did not reveal to trial counsel.

Petitioner's case in mitigation at trial failed because his rendition of the factual events were proven false by other witnesses and because petitioner's sketchy description of his alleged psychotic episode was not plausible.

State Court Findings:

The State court in its finding after an extensive evidentiary hearing concluded:

> "Again as stated in *Strickland,* supra, the issue to be decided is whether there is a reasonable probability that at least one of the jurors hearing this evidence "would have concluded that the balance

of aggravating and mitigating circumstances did not warrant death." It is this Court's opinion that no juror would have so concluded. The enormity of the crime committed was so great that any mental disease or defect, short of legal insanity, would simply not, in this Court opinion, have tipped the balance in any jurors mind so as not to warrant a sentence of death." (Reasons for Ruling Judgment, April 14, 1988)

D) PHYSICAL TESTING DID NOT SUPPORT THEORY OF BRAIN DAMAGE OR DISFUNCTION

Both Dr. Honor and Dr. Scanlon indicated that Mr. Loyd may have been suffering organic brain disfunction yet the physical test performed at their request do not support their theory. Conveniently the tests were not completed when Dr. Honor testified but the tests were completed and interpreted prior to Dr. Scanlon's testimony. The test and physical finding did not support a theory of physical brain disfunction.

The transcript of the evidentiary hearing reflects the following:

QUESTION:

> "Doctor, have you obtained any reports or have you requested any physical studies which would suggest to you that or prove to you that Mr. Loyd is suffering from some or from any brain damage?" (Evidentiary Hearing Transcript p. 644 line 19-24)

ANSWER:

> "....There was a electroenecophalogram that was preformed on Mr. Loyd sometimes in the last two weeks. .... I guess that was interpreted as having some non-specific abnormalities to it that were not diagnostic of anything par-

ticular." (Evidentiary Hearing Transcript p. 645 line 5-12)

QUESTION:

"And based on that are you prepared to render an opinion to this Court as to possible brain damage?" (Evidentiary Hearing Transcript p. 646 line 19-21)

ANSWER:

"No, I can say nothing more than the report said that it was a non-specific finding." (Evidentiary Hearing Transcript p. 646 line 23-24)

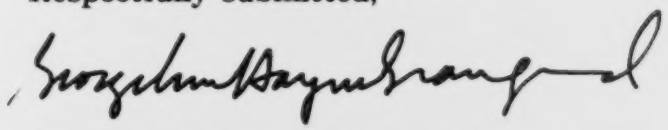
The record reflects that there is no physical evidence of brain disfunction.

CONCLUSION

This Honorable Court should not allow petitioner's current version of the crime, spoon fed to psychiatrists who have evaluated him eight years after the commission of the crime, to replace competent psychiatric and medical examinations done in close proximity to the crime. The events leading up to the commission of the crime, the witnesses who observed Loyd the day and night of the crime, challenge the hypothesis that he was undergoing a psychotic episode. Loyd's description of the crime, his confession, his hiding the body and destroying evidence do not support a finding of mental deficiency sufficient to overcome two jury sentences of death. The appellant should not be allowed to supplant the record of sworn testimony with conjecture and fabrications that have no factual basis.

Considering the apparent conflict among the Courts of Appeal on the questions presented, the State of Louisiana respectfully requests that its Writ Application be granted, and for any and all equitable relief.

Respectfully submitted,



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NO. 92-1548

In the
Supreme Court of the United States

OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
FEB 22 1993
CLERK

JOHN P. WHITLEY, WARDEN
PETITIONER

VERSUS

ALVIN SCOTT LOYD
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3764

FILED
OCT 29 1992

ALVIN SCOTT LOYD,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary
at Angola, Louisiana,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before POLITZ, Chief Judge, HIGGINBOTHAM and DUHE' Circuit Judges.

POLITZ, Chief Judge:

Having been convicted of first degree murder and sentenced to death by a jury, Alvin Scott Loyd petitions for federal habeas corpus relief claiming ineffective assistance of counsel in the penalty phase of his capital murder trial. The district court denied his petition. Finding ineffective assistance of counsel in the penalty phase, we reverse, render, and remand.

Background

Chronology of Proceedings

Loyd was charged with the capital murder of three-

year-old Brandi Giovanetti.[1] Local Law enforcement officials apprehended Loyd when he returned to his residence. Loyd was held in custody at the Feliciana Forensic Facility following a Sanity commission determination that he was not competent to stand trial. After four months Loyd was deemed competent to stand trial.

A jury found Loyd guilty and imposed the death penalty. The Louisiana Supreme Court affirmed the conviction but vacated the death sentence, remanding for a new sentencing trial because a faulty instruction to a hesitant jury violated the integrity of the unanimous jury verdict. At the second sentencing trial the jury again imposed the death penalty. The sentence was affirmed on appeal.[2]

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[1] The basic facts of the case have been established in the state proceedings:

> On the evening of April 26, 1981, Tina Giovanetti and her three-year-old daughter were walking home after attending a fair in Terrebonne Parish. They accepted defendant's offer of a ride in his pick-up truck. When he reached the Giovanetti home, the defendant asked if he could come in. The woman refused his request and stepped out of the truck. Before she could remove her daughter, however, the defendant drove off with the little girl inside the cab. The defendant traveled to the Mississippi River, crossed into St. John the Baptist Parish on the Lutcher ferry, and continued down a desolate dirt road near a pipeline. At a remote spot, he raped the child, drowned her in a ditch, carried her body into an adjacent swamp, and covered it with leaves.

State v. Loyd, 489 So.2d 898, 900 (La. 1986) (quoting State v. Loyd, 459 So.2d 498, 500 (La. 1984)).

[2] State v. Loyd, 489 So.2d 898 (La. 1986), *cert. denied* 481 U.S. 1042, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987), *reh'g denied of cert. denial*, 483 U.S. 1011, 107 S.Ct. 3244, 97 L.Ed.2d 749 (1987).

The state trial court denied Loyd's first petition for post-conviction relief but the Supreme Court of Louisiana granted a stay of execution and remanded the case to the state trial court for an evidentiary hearing on four issues, including the ineffective assistance of counsel claim.[3] After a hearing, the state court concluded that the performance of counsel at the second sentencing trial was deficient; however, the state court denied habeas relief on the ground that counsel's deficient performance did not prejudice Loyd. The Louisiana Supreme Court denied Loyd's application for review, assigning no reasons.

After exhausting state court remedies, Loyd sought federal habeas relief. The district court granted a stay of execution but ultimately denied Loyd's requested relief. In regard to the ineffective assistance claim, the district court concluded that, contrary to the finding by the state court, counsel's performance was not deficient. We vacated the district court finding on the ground that proper deference had not been given to the state court's findings of fact as required by 28 U.S.C. § 2254(d).[4] We directed the district court to conduct an evidentiary hearing if it concluded that the record was not fully developed.

The district court did not conduct a hearing but reviewed the state habeas court findings, adopted some, rejected others, and reached conclusions of its own. The court again held that the performance of counsel was not deficient and additionally found that any hypothetical deficiency did not prejudice Loyd.

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[3] State ex rel. Loyd v. Butler, 514 So.2d 446 (La. 1987); 532 So.2d 758 (La. 1988).

[4] Loyd v. Smith, 899 F.2d 1416 (5th Cir. 1990).

State Proceedings: Sentencing and Post-Conviction Hearing

After conducting an evidentiary hearing, the state habeas court concluded that the professional performance of Loyd's defense counsel in the 1985 sentencing trial fell below reasonable professional standards. Loyd's defense team was composed of three attorneys. Court-appointed counsel Gordon Hackman and Randy Lewis had represented Loyd in the 1983 proceedings and had asked permission to withdraw as counsel three weeks before the second sentencing trial. This request was denied but William Allison was added to, and headed, the defense team. At that time Allison's law practice was, as described by him, "ninety percent civil, various mix and ten percent criminal." Allison had practiced law for 14 years and had participated in approximately six criminal jury trials, including one capital case. Hackman, who had been lead counsel at the guilt/innocence phase, had a practice composed primarily of civil litigation, although his firm had accepted a number of criminal cases in the mid 1970s. Lewis was his law partner. At the state habeas hearing, all three attorneys expressed dissatisfaction with their representation of Loyd in the 1985 sentencing trial.

At trial the defense called three doctors, all of who had been retained by the state to determine Loyd's competence to stand trial. Also in evidence at the penalty phase were sanitarium admission papers reciting an initial diagnosis of "Antisocial Personality Disorder," a Psychological report, a Neuropsychiatric Examination report, a Neurological Examination report, and the report of a social worker. Most of the psychological testimony was presented by Dr. Cox, Loyd's treating physician at the Feliciana Forensic Facility, where Loyd was held during the four months that he was diagnosed as incompetent.

Allison spoke with Dr. Cox for the first time on the day of the trial, for 45 minutes during the lunch hour. Also testifying were Dr. St. Martin, the Feliciana coroner and a member of the Sanity Commission that found Loyd initially incompetent, and Dr. Ritter, the other Sanity Commission member.

Although Dr. St. Martin described "an in-depth exam" with Loyd, Dr. Ritter emphasized that he "did not do a detained personality inventory on Mr. Loyd." Dr Ritter also described the role of the Sanity Commission as limited:

> When you evaluate someone in a prison setting and someone who is depressed sometimes that's very difficult to get any details. Besides you're there for two specific purposes. Not to get a personality inventory, to make a detailed study of personality, but to determine if there ware any mental diseases or defect which could impair his ability to proceed to trial or could impair his ability to tell the difference between right and wrong.

No independent psychiatrist or psychologist testified on Loyd's behalf in the sentencing phase despite the fact found by the state court that Loyd's sanity was a critical issue. Allison had initially requested $1,000 to hire an independent, neutral psychiatrist to testify in Loyd's defense; $600 was approved. Thereafter, according to the state court, "Allison made several half-hearted attempts to procure [independent, psychiatric] services, but eventually abandoned those efforts." Hackman had $1,250 which had been given to him by Loyd's mother to be used for Loyd's defense. Hackman did not inform Allison of the availability of these funds. Hackman did not pursue further psychiatric testimony because he believed that such an attempt would have been futile.

The state court made the factual finding that Hackman's decision was based upon a failure to understand the difference between the McNaughten test for sanity and the Louisiana mitigating factors of "mental or emotional distrubance," or "mental disease or defect."[5] The state court also found that the aggregate funds available were sufficient for an independent psychiatric analysis of Loyd. The court concluded that "for counsel not to have sought such an evaluation, where funds were available to do so, was an error which fell below the professional standards of conduct required to constitute proper representation."

Loyd's new habeas counsel sought the services of doctors whose testimony in the state habeas evidentiary hearing presented a more detailed explanation of Loyd's mental impairments. Dr. Kenneth Perkins, a clinical psychologist, reviewed the raw data from the Feliciana tests and determined that to a large extent the data had been misinterpreted in such a way that Loyd did not receive additional necessary testing.[6] Dr. Stephnen Honor, also a clinical psychologist, repeated the psychological tests; the raw data from the new psychological tests mirrored the Feliciana raw data. Dr. Honor, like Dr. Perkins, found that the Feliciana staff's interpretation of the data understated the extent of Loyd's mental impairments. Similarly, Dr. Barry Scanlon examined Loyd, reviewed his records from Feliciana, and disagreed with the Feliciana conclusions. Dr. Sanchez, the forensic psychiatrist requested by counsel for the state, examined Loyd after both

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[5] La. Code Crim. Pro. art. 905.5(b), (e).

[6] Dr. Perkins did not testify but his written report was entered into evidence. Drs. Honor, Scanlon, and Sanchez all testified at the state post-conviction hearings. Drs. Honor and Scanlon also prepared detailed reports, which were entered into evidence.

the state and the defense accepted him as qualified. Because of the opinion formulated after this review, Dr. Sanchez was called to testify by Loyd's counsel.

The evidence presented at Loyd's sentencing trial — evidence based on the Feliciana conclusions — markedly differs from the new evidence.

1. *Sanity*

Sentencing Phase Testimony and Evidence

At the penalty phase, Drs. St. Martin and Ritter testified that at the time of the crime, Loyd knew the difference between right and wrong. Dr. Cox concurred that Loyd was "sane" at the time of the crime. In the state habeas hearing, Dr. St. Martin testified that he based his diagnosis of Loyd's sanity on "how he was feeling, [he was not] hallucinating, his general psychological condition at the time, and the things that he was able to do at the site of the crime and after the crime." Dr. St. Martin stated that he did not believe it was possible for individuals to "not show . . . any phychosis any other time but just have a short burst of psychosis."

New Testimony and Evidence

The experts presented by Loyd's habeas counsel all expressed doubts regarding Loyd's sanity at the time of the crime. Dr. Honor reported that:

> While Mr. Loyd did apparently form an intent to kill the child, the evidence of his mental and emotional state, based upon his self report and the examination results, strongly suggests that he would have been unable to appreciate the

> significance of this act or the probable consequences of this act. Therefore, at that point in time it can be said that Mr. Loyd could not distinguish between the concept of right and wrong.

Dr. Honor opined that there was an 80 to 90 percent probability that Loyd did not understand his actions at the time of the crime. Similarly, Dr. Scanlon reported that:

> I think a convincing case can be made that Loyd was incapable of distinguishing between right and wrong in view of my conclusion that the quality of Loyd's acts were delusional (psychotic) or delirious (impaired by physical factors) . . . . Loyd may have had a rather limited awareness that he was drowning, raping and sodomizing a little girl (the "nature" of his acts) but it is unlikely in view of his delusional (psychotic) or delirious (impaired by physical factors) state that he could have understood the moral significance of his acts (the "quality" of his acts).

Dr. Honor described how Loyd could move in and out of a psychotic state:

> Loyd represents an individual who is a borderline psychotic. He has a number of personality traits that certainly appear to be [of] very long standing duration. . . . [I]ndividuals [who] get that designation . . . under reasonable circumstances are able to hold themselves together. There is some kind of personality integrity they can hold together. When individuals like that are exposed to very stressful circumstances the great likelihood is that there is going to be a deterioration. . . . [I]t may in fact precipitate the development of a frank

> psychosis. But probably in many, many cases they become temporary episodes where the person spontaneously regenerates so to speak after the stressors have been . . . by-passed.

The sources of information "most pertinent" to Dr. Honor in making this diagnosis were his clinical interviews with Loyd and Loyd's letters.

Dr. Sanchez, an expert forensic psychiatrist frequently appointed to state sanity commissions, considered Loyd to have experienced a "psychotic episode" with "sensations of losing control over his mind." Loyd knew right from wrong at some points, but not at others.

2. *Inability to Stand Trial*

Sentencing Phase Testimony and Evidence

The Sanity Commission determined that Loyd was initially incompetent to stand trial because "he was severely depressed and he could not best assist his counsel at that time." Dr. Ritter, a member of the Sanity Commission, confirmed the Commission's finding that Loyd was depressed:

> [Loyd] was crying, expressed remorse, . . . best thing I could say, is he, he was suffering from depression, he was feeling blue, remorseful, down in the dumps, and as a result of that he was more difficult than usual to talk to because his thoughts were not coming very rapidly, he was slowed up, like most people who are depressed experience.

Dr. Cox, Loyd's treating physician at Feliciana, also stated that Loyd had been depressed and despondent, but stated

that Loyd's incarceration for the crime was a major part of his depression. Similarly, Dr. St. Martin acknowledged that it was very possible that remorse at being caught could have caused Loyd's depression.

New Testimony and Evidence

Dr. Honor disagreed with "[t]he conclusion by the forensic experts that Mr. Loyd's level of disturbance was likely to be a result of his reaction to his crime and his arrest rather than a representation of his general psychological state."

3. *Psychological Traits Revelant to Crime*

Sentencing Phase Testimony and Evidence

Dr. Ritter said little ragarding Loyd's personality traits because he did not do a detailed personality inventory on Loyd.[7] Dr. Cox had ordered a neurology exam and other psychological tests. At the time of trial, Dr. Cox stated: "I cannot explain why this happened." Defense counsel questioned Dr. Cox regarding specific findings in a psychological evaluation report performed at Feliciana. At the onset, Dr. Cox stated that he agreed with parts of the report yet had doubts regarding other conclusions. This report was admitted into evidence. The report recited the probable etiology of the crime:

Mr. Loyd was himself a victim of child abuse and

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[7] Dr. Ritter did testify that "generally in somebody who has committed that type of crime" displacement has occurred: "[T]he strong feelings that go along with abuse of children, are feelings that have been transferred from another adult to that child. Feelings of frustration, rage, this type of thing." Dr. Ritter added that in general, child abusers were themselves abused as children.

> he had a very poor model for adult masculine behavior. He was not able to integrate the antisocial patterns of behavior he learned from his father with the excessively moralistic standards he was taught by his mother. One consequence of this confusion was that he had not obtained a stable adult sexual adjustment. And another consequence was that he developed a pattern of substance abuse.

Regarding this conclusion, Dr. Cox testified: "I think it's very clear that he developed a pattern of substance abuse. As far as stable adult sexual adjustment, I can't comment on that." Dr. cox testified that the following excerpts from the Feliciana report were "consistent with Mr. Loyd's personality and makeup":

> On the day of his crime, his intoxication rendered his inhibitions ineffective. Apparently he committed the crime cognizant of the wrongness of it but unwilling or unable to stop himself . . . . Later overwhelmed by horror over his actions he avoided memory of the events.

Regarding Loyd's history of child abuse, Dr. Cox testified that a vey high percentage of people who commit violent acts have a history of abuse as children. He further explained that the kind of stimulus that could trigger Loyd into blowing up included stress, pressure, substance abuse, or sleep deprivation.

New Testimony and Evidence

Dr. Honor reviewed the raw test scores from the Feliciana tests, performed his own tests, and found many of the raw test scores to be consistent with the Feliciana results. Pursuant to his interpretation, the test results evidence

somatic delusions, disordered thinking, chronic psychological maladjustment with chronic disorientation, alienation and withdrawal. Dr. Honor found Loyd to be "of a borderline psychotic nature [with] very clearly paranoid ideology and schizophrenic personality characteristics." "Diagnostically he is seen as manifesting a schizoid or schizotypal personality . . . . The personality profile indicates extremely high elevations in overall emotional disturbance, depression, and schizophrenia." Dr. Horor explained the circumstances of the crime:

> Loyd's description of his subjective perceptions from the time of being in the bar until after committing the crime strongly suggests an altered state of consciousness, part of which seems to be rooted in several somatic delusions . . . . Mr. Loyd reports strong feelings of confusion through the night and a dreamlike quality to his state of consciousness . . . The overwhelming feelings of being threatened, which appear to have been significantly exacerbated by his diminished state of cognition and his underlying paranoid ideation, seems to have triggered a response of rage and fear that became displaced onto this child, who was, at the time, seen as a significant part of this sense of threat. The decision to kill the child seems to have been perceived as a means of eliminating the threatening circumstances . . . . Loyd's sexual attack of the child is seen as a violent weapon aimed at silencing the child.

Dr. Perkins likewise concluded that the Feliciana interpretation of Loyd's raw test data tended to overlook or understate the extent of Loyd's chronic emotional disturbance. Some of the patterns are "typically regarded as the classic paranoid-schizophrenia profile." Drs. Perkins, Scanlon, and Sanchez each found no basis for the Feliciana admissions report diagnosis that Loyd has an antisocial

personality disorder.[8]

Dr. Scanlon testified that the Feliciana psychological report "was insufficient in terms of trying to . . . come up with an explanation for Loyd's behavior." Dr. Scanlon believed that physical impairment of thought was the ultimate cause of the crime:

> I personally do not see Loyd's crime as primarily determined by emotional or psychological factors . . . . [T]he "form" his actioins took (the killing of a little girl after raping and sodomizing her) was probably determined by "emotional or psychological factors" rooted in Loyd's childhood experience. I believe, however, that what triggered his actions was largely an organic (or physical) impairment of thought.

4. *Brain Damage*

Sentencing Phase Testimony and Evidence

A neuropsychiatric report mentions scarring of the right temple, weakness on Loyd's left side, and some decreases in sensory response.[9] The report concludes that Loyd "exhibits no evidence of overt psychosis or brain syndrome" and that the "focal neurological findings in terms of weakness and sensory deficit are fleeting and would ap-

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[8] During the post-conviction state habeas evidentiary hearing, Drs. Cox, Ritter, and St. Martin admitted that the "antisocial personality disorder" diagnosis, which was shown to the jury in a report in the sentencing phase was "in error." Similarly, Dr. Fain, who conducted the Feliciana psychological evaluation of Loyd, testified that Loyd is not a sociopath.

[9] While at Feliciana, Loyd had complained of intermittent weakness of the left extremity, causing him to drop objects and experience occasional paresthetic numbness.

pear at this time to be hysterical in etiology." A neurological exam, although finding some inconsistencies in sensory responses, did not report neurological impairment or neuromuscular disease.

The psychological evaluation explained:

> Testing for Organic Brain Damage was not extensive. Some evidence of problems coordinating movement in his left hand was revealed, thus lending support to his complaints of weakness in this area. It is not possible to say when the damage might have been sustained. Other than that, no evidence of brain damage was found . . . . [Loyd] may have sustained some minor brain damage. This appears to be unrelated to either the commission of the crime or his memory loss.

New Testimony and Evidence

Dr. Perkins reported that the Feliciana tests inadequately investigated the possibility of brain damage. According to Dr. Perkins, the raw test scores from the Feliciana psychological evaluation contained inconsistencies associated with underlying organic factors, such as brain dysfunction. Dr. Perkins found that the following facts point to the possibility of brain damage: (1) that Loyd's mother sustained paint poisoning one month before his birth, (2) family history of epilepsy, (3) family history of dyslexia, (4) Loyd's history of head injuries, (5) the radiation therapy Loyd received as an infant for the open exposure of blood vessels in his temple, (6) family history of alcoholism, (7) Loyd's personal history of chemical abuse, (8) Loyd's history of headache experience, and (9) the possibility of a head injury while boating on the day of the crime. Regarding the neurological exam performed at Feliciana, Dr. Perkins stated:

> The neurological exam at Feliciana observed the left-handed weakness in [Loyd's] behavior as well as significantly lower sensation to touch or pin prick on the left side of his body, including arm and leg but was regarded as probably hysterical symptomatology. That certainly would be consistent with Dr. Fain's comment that [Loyd] may tend to express anxiety through somatic complaints, but it also may be indicating, again, a nervous system disorder which, like the possibility of his headaches, may be somatic reactions with neurological basis which are activated by times of intense emotion which would include anxiety, stress/tension, etc.

Dr. Honor reported that the tests of neuropsychological functioning "while not definitive, are consistent with a diagnosis of frontal lobe dysfunction. Such dysfunction would be expected to have an impact on judgment, and higher levels of cognitive functioning such as organization of thought and processing of complex ideas."

Analysis

An ineffective assistance of counsel claim requires a two-part showing that: (1) counsel's performance was deficient, meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) The deficient performance prejudiced the defendant by depriving him "of a fair trial, a trial whose result is reliable."[10] A state court conclusion regarding effective assistance of counsel is a mixed question of law and fact. State court findings of fact made in the course of deciding a sixth amendment ineffectiveness claim are subject to the deference require-

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[10] Strickland v. Washington, 466 U.S. 668, 687 (1984).

ment of section 2254(d).[11]

In determining whether counsel's representation passes constitutional muster, we must make an independent evaluation based on the state court's subsidiary fact findings; we need not defer to the district court's conclusion.[12]

Performance of Counsel

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.[13] All of the circumstances must be considered. In this consideration, however, we must guard against the temptations of hindsight and second-guessing. Accordingly, a reviewing court must grant counsel's decisions a reasonable presumption of reasonability.[14] Applying these guidelines, the state habeas court concluded that the performance of counsel in Loyd's 1985 sentencing trial fell

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[11] 28 U.S.C. § 2254(d) provides:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written indicia, shall be presumed to be correct . . . [unless certain enumerated statutory requirements are met, including:]

(8) . . . the Federal court on a consideration of such part of the [state] record as a whole concludes that such factual determination is not fairly supported by the record. . . .

[12] Nealy v. Cabana, 764 F.2d 1173, 1176-77 (5th Cir. 1985).

[13] Strickland, 466 U.S. at 688.

[14] Id. at 689-90.

below reasonable professional standards. The state court found that funds for an independent psychiatric expert were available, that Loyd's sanity was a critical issue, that counsel were aware of the critical nature of Loyd's sanity, and that lead counsel made only "half-hearted" attempts to obtain independent evidence regarding this sanity and abandoned those efforts for no strategic purpose. The court a quo acknowledged these factual findings as binding pursuant to section 2254(d), but by discounting other state findings as being erroneous or irrelevant, and by supplementing the findings, the district court avoided the state court conclusion that counsel's performance was not within the range of professional reasonability. The district court opined that calling Drs. Cox, Ritter, and St. Martin "was more than reasonable and constitutionally adequate under the circumstances prevailing at the time of trial."

The district court discounted the state habeas court finding that: "[T]he most compelling fact in the performance of counsel in this matter is that they simply failed to develop independent psychiatric evidence of mental disease or defect in a death case where this line of investigation was clearly indicated." Regarding this statement, the district court held that "to the extent that the state court implied . . . that *no* statutory mitigating circumstances were presented on Loyd's behalf at trial, . . . such a conclusion is *not supported by the record and is clearly erroneous.*" The district court made the supplemental conclusion that Loyd's counsel presented significant statutory mitigating psychiatric testimony. We cannot agree, but accept as binding the state court finding that defense counsel's failure to pursue a crucial line of investigation in a capital murder case was not professionally reasonable.

The state court found that Hackman did not appreciate the distinction between the McNaughten rule and

the mitigating circumstances of mental disease or defect. Hackman, who was court-appointed and did not wish to represent Loyd, testified at the state hearing that despite his general experience with criminal trials, he did not feel competent to handle the case, he was convinced that the defense should have conducted additional investigation and should have obtained the assistance of a forensic psychiatrist. Allison, who had participated in at least six criminal jury trials, testified that he did not believe that his representation of Loyd contributed to the defense.[15] The state court discounted this testimony, stating: "[O]n the case of Mr. Allison, his personal abhorrence of the death penalty might well have affected his later assessment of his conduct." The district court accepted the state court decision to discount Allison's testimony, but dismissed as inconsequential that court's fact-finding that Hackman misunderstood the law regarding mitigation circumstances. According to the district court, Hackman's knowledge was irrelevant because Hackman was not lead counsel.[16] Aside from noting our consistent insistence that

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[15] When asked whether he did an effective job, Allison responded: "I don't think I added anything to the Defense. I was hampered by my lack of experience. I really in retrospect should not have ever enrolled in this case. And perhaps they would have found someone else more qualified and more competent enough to do it. I was hampered by lack of funds, by geographic distance, and by my lack of experience."

[16] The district court concluded that Allison was lead counsel and therefore reasoned that the state court decision regarding Hackman was irrelevant because Hackman did not decide who would be called as a witness in the 1985 sentencing proceeding. Nonetheless, the district court also placed great weight on the fact that Hackman, long before Allison arrived at the scene, had retained a psychiatrist who had concluded that Loyd was sane pursuant to the McNaughten test. Because Hackman did not discern the difference between the legal test relevant in the guilt/innocence phase and that relevant in the penalty phase, we find support for the state court's rejecting the alleged significance of the psychiatrist employed by Hackman.

effectiveness of counsel requires familiarity with current state law,[17] we refrain from further dissection of Hackman's role. The essence and significance of the state court's finding of fact is that *no* member of the defense team made the strategic decision referred to in Strickland regarding the critical issue in this death case.

The contrast between the data and testimony presented in the 1985 proceeding and the new evidence warrants our rejection of the district court's supplemental finding that Loyd's defense counsel introduced significant mitigating evidence. The marked disparity in testimony establishes that reasonable professional standards require that counsel should have used readily available funds to hire an independent psychiatrist to put Loyd's mental condition in proper focus.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[18] Counsel's professional duty may be met in more than one way:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel had a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[19]

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[17] Trass v. Maggio, 731 F.2d 288, 293 (5th Cir. 1984); Kennedy v. Maggio, 725 F.2d 269, 272-73 (5th Cir. 1984); Vela v. Estelle, 708 F.2d 954-963-64 (5th Cir. 1983), *cert. denied*, 464 U.S. 1053 (1984).

[18] Strickland, 466 U.S. at 691.

[19] Id. at 690-91.

The state court's factual findings make clear that the decision of defense counsel not to pursue an independent psychological analysis of Loyd was neither a strategic choice made after investigation nor a strategic choice made in light of limits on investigation. There were no limitations; funds were available. According to the state factual findings, Allison's decision had nothing to do with strategy; he wrongly assumed that funds were unavailable and he abandoned what he knew to be an important pursuit. Hackman's decision had not been made after thorough investigation of the law; Hackman was unaware of the law.[20]

Whether counsel's omission served a strategic purpose is a pivotal point in Strickland and its progeny.[21] The crucial distinction between strategic judgment calls and plain omissions has echoed in the judgments of this court.[22] For

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[20] We find unpersuasive the district court's supposition that at the time of trial, "Loyd's attorneys had no basis for assuming that they could have found a psychiatrist somewhere in the country who would testify that Loyd may have a mental disease or defect which impaired the petitioner's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." This conclusion clashes with the finding by the state court that lead counsel did indeed decide that pursuit of independent testimony was warranted, but abandoned what was characterized as a "half-hearted" attempt.

[21] *See, e.g.*, Strickland, 466 U.S. at 691; Kimmelman v. Morrison, 477 U.S. 365 (1986) (emphasis on fact that counsel's failure "was not based on 'strategy,' but on counsel's mistaken beliefs. . . .").

[22] *See* Profitt v. Waldron, 831 F.2d 1245, 1249 (5th Cir. 1987) (where counsel's omission presented "no advantage" to the defense, the court refused to accord "our usual deference to tactical decisions"); Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985); Cook v. Lynaugh, 821 F.2d 1072, 1078 (5th Cir. 1987) (finding ineffective assistance with emphasis on fact that failure to investigate was not a strategic choice); Martin v. McCotter, 796 F.2d 813, 819 (5th Cir. 1986), *cert. denied*, 479 U.S. 1057 (1987) (because the extent of investigation and the extent that counsel's decision constituted a "reasonable strategic choice" was unclear, the

example, in Nealy we found counsel's performance deficient and stressed that at a post-conviction hearing, the defense counsel "did not testify that such efforts would have been fruitless, nor did he claim that the decision not to investigate was part of a calculated trial strategy. He simply failed to make the effort."[23] Counsel " 'did not *choose*, strategically or otherwise, to pursue one line of defense over another. Instead, [he] simply abdicated his responsibility to advocate his client's cause.' "[24]

Finding a void of available evidence on a critical issue in a death penalty case, we hold that counsel's performance was not professionally reasonable.

Prejudice

The prejudice component of the Strickland test requires a showing

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(Footnote 22 continued)

court based its holding on the prejudice prong); *see also Selvage v. Lynaugh*, 842 F.2d 89, 95 (5th Cir. 1988), *cert. denied*, 493 U.S. 973 (1989) (reasonable strategic decision not to pursue mental background because state rebuttal could turn evidence against the defendant); Kramer v. Butler, 845 F.2d 1291 (5th Cir.), *cert. denied*, 488 U.S. 865 (1988) (counsel's decision not to pursue more than one independent psychiatrist was reasonable where no facts indicated that an insanity defense was tenable); Mattheson v. King, 751 F.2d 1432, 1440 (5th Cir. 1985) (failure to investigate fell "within the realm of sound trial stategy") Bell v. Lynaugh, 828 F.2d 1085 (5th Cir.), *cert. denied*, 484 U.S. 933 (1987)(emphasis on strategic motives for counsel decision). We acknowledge that "strategy is not necessarily the line of demarcation for defense decisions to investigate. *See, e.g.*, Smith v. Black, 904 F.2d 950, 977 (5th Cir. 1990), *vacated on other grounds*, 112 S.Ct. 1463 (1992).

[23] 764 F.2d at 1178.

[24] Id. (citation omitted) (emphasis added in original).

> that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making the determination whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law.[25]

The state court and the district court held that Loyd had not demonstrated prejudice.

The state court found that the opinions of the experts testifying in the habeas proceeding were, to some extent, based on three unproven hypotetical facts: that Loyd was involuntarily drugged, that he worked unusually long hours in excessive heat in the days preceding the crime, and that he suffered a concussion on a boat ride on the day of the crime. The state court declared that, "the opinions of Drs. Honor, Scanlon, and Sanchez, to the extent that they were based on these assumptions, would probably have had no influence on the jury's assessment of petitioner's psychological condition on the night of the crime."[26] Regarding frontal lobe brain damage,[27] the state court observed that "no more than a suspicion was indicated, even by his own experts, that this irregularaity ex-

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[25] 466 U.S. at 694.

[26] The court omitted reference to Dr. Perkins' report, which was admitted into evidence, although Dr. Perkins did not testify. Dr. Perkins did not examine Loyd; the state court presumably discounted Dr. Perkins' opinions to the same extent that the other expert opinions were dismissed.

[27] Dr. Scanlon testified that the electroencephalogram performed on Loyd indicated abnormalities but was not diagnostic of any specific mental infirmity, such as epilepsy or a brain tumor.

plained or excused the crime." The court considered whether there was "a reasonable probability that the remaining overall testimony of Drs. Honor, Scanlon and Sanchez as to petitioner's diminished capacity or mental disease or defect, would have been found by at least one juror, to be a mitigating factor sufficient to change his or her verdict of death." The court accepted the doctors' conclusions that Loyd suffered from a mental disease or defect that in all probability predated the crime. Yet, according to the court, "[t]he enormity of the crime committed was so great that any mental disease or defect, short of legal insanity, would simply not, in this court's opinion, have tipped the balance in any juror['s] mind so as not to warrant a sentence of death."

Giving deference to the state habeas decision, we accept as unproved the theories that Loyd was drugged and exposed to excessive heat, that he suffered a head injury on the day of the crime, or that the clinical signs of physical abnormality in his frontal lobe brain functions explained the crime. The state court did not explain what portions of the experts' opinions rested on these assumptions; however, it is apparent that the court found a mental disease or defect predating the crime but did not find legal insanity at the time of the crime. If the record were incomplete with regard to this prejudice issue, we would remand for an evidentiary hearing.[28] Our review of the state habeas hearing, however, discloses significant testimony and documentation regarding the factors the experts used in assessing Loyd's mental capacity. It is abundantly clear that significant portions of the experts' testimony were not based on the suggested unproven factors.

When questioned regarding the basis of his

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[28] *See* Kimmelman, 477 U.S. at 390-91.

diagnostic conclusions, Dr. Honor stated that he based his analysis on a combination of his examination of Loyd in person, his meeting with Loyd's mother, and all of the available test and diagnostic data. Dr. Honor reported that the *tests* he performed indicated somatic delusions, disordered thinking, chronic psychological maladjustment with chronic disorientation, alienation, and withdrawal. Regarding the immediately preceding events, Dr. Honor assumed that Loyd had been drinking, but of other drugs he discussed only biochemical precipitators. Dr. Honor listed contributing factors: that Loyd apparently had little sleep, had been working long hours in the heat, had been arguing with his wife over financial difficulties, had encountered rejection, and had been depressed. He emphasized that no individual factor was determinative of his analysis, but that based on all of the data he diagnosed Loyd as a borderline psychotic with problematic personality traits of very longstanding duration. Dr. Honor also gave substantial independent weight to Loyd's description of events, as this description specifically matched what is known clinically about psychotic states. Dr. Honor testified that the information most pertinent to his diagnosis consisted of the letters Loyd wrote and his clinical interviews of Loyd.

Dr. Scanlon likewise gave significant weight to his interview with Loyd. He discussed the unproven factors as being "presumed" or "possible" and indicated his awareness that these factors might not be supported by the evidence.

Dr. Sanchez stated that he did not know whether Loyd was drugged. He recited hypothermia and fatigue as part of his factual basis, stating that no one trigger set Loyd off; rather, the stresses were cumulative. Both Dr. Scanlon and Dr. Sanchez testified that in their opinion

Loyd was not faking and, in fact, that he could not fake his mental defect.

Discounting the unproven factors, the experts' fundamental opinions are largely based on Loyd's descriptions of the crime and on test scores and interviews. These experts, including Dr. Sanchez, the psychiatrist first selected by the prosecution, found that during the crime Loyd was experiencing the effects of substantial pre-existing mental defects. The absence of this mitigating evidence undermines our confidence in the outcome of Loyd's penalty phase. We are charged with "assess[ing] . . . the likelihood of a result."[29] The weighing of the defendant's mental condition was for the jury, which "must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party."[30] As we noted in our earlier opinion,[31] because of counsel's inadequacy the jury could not perform this function.

We now hold that there is enough evidence proving mental disease and defect that the balance of aggravating and mitigating factors in this case must be weighed by a jury in a new sentencing hearing.

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[29] Strickland, 466 U.S. at 695.

[30] Ake v. Oklahoma, 470 U.S. 68, 81 (1985).

[31] *See* Loyd v. Smith, 899 F.2d at 1427 (quoting Ake, 470 U.S. at 84). We earlier quoted:

> Without a psychiatrist's assistance, the defendant cannot offer a well informed expert's opposing view, and thereby loses a significant opportunity to raise *in the juror's minds* questions about the state's proof of an aggravating factor.

470 U.S. at 84 (emphasis added).

The judgment of the district court is REVERSED and judgment is now RENDERED granting the requested writ of habeas corpus. The case is REMANDED for entry of an appropriate judgment issuing the Great Writ and directing the State of Louisiana, at its own option, to sentence Loyd to life imprisonment or to retry the sentencing phase of his trial within a reasonable period.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
OCT 10 '90

ALVIN SCOTT LOYD,	CIVIL ACTION
VERSUS	NO. 89-1389
R. HILTON BUTLER, WARDEN LOUISIANA STATE PENITENTIARY AT ANGOLA, LOUISIANA	SECTION D (5)

J U D G M E N T

For reasons set forth in this Court's Opinion and Order dated October 10, 1990, the Petition for Writ of Habeas Corpus is DENIED.

New Orleans, Louisiana, this 10th day of October, 1990.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY OCT 10 1990

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
OCT 10 '90

ALVIN SCOTT LOYD,	*	CIVIL ACTION
VERSUS	*	NO. 89-1389
R. HILTON BUTLER, WARDEN LOUISIANA STATE PENITENTIARY AT ANGOLA, LOUISIANA	*	SECTION "D" (5)

OPINION AND ORDER

PROCEDURAL HISTORY

In a bifurcated trial, Petitioner Alvin Scott Loyd was convicted of murdering three-year old Tina Giovanetti on the evening of April 26, 1981, and was sentenced to death. On appeal the Louisiana Supreme Court affirmed the conviction, but vacated the death sentence and remanded for resentencing because the trial judge refused Defendant's requested instruction on the consequences of a non-unanimous jury vote. *State v. Loyd*, 459 So. 2d 498 (La. 1984).[1]

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[1] The court's Opinion in this matter often relies upon aspects of the court's original Opinion and Order, dated July 27, 1989. The court finds that its ruling in this matter cannot be presented clearly without

DATE OF ENTRY OCT 10 1990

A second sentencing trial began on May 6, 1985, and another jury again recommended the death penalty, finding that the offense was committed in an especially heinous, atrocious or cruel manner and that the offender was engaged in the perpetration or attempted perpetration of an aggravated rape and aggravated kidnapping. This second death sentence was appealed, the Louisiana Supreme Court affirmed, and the United States Supreme Court denied certiorari twice. *State v. Loyd*, 489 So. 2d 898 (La. 1986), *cert. denied*, 107 S. Ct. 1984 (1987), *reh'g denied of cert. denial*, 107 S. Ct. 3244 (1987).

On September 1, 1987, the State District Court issued a warrant for the execution of Petitioner and set the execution date for October 16, 1987. Loyd then filed a Petition for Post-conviction Relief, Stay of Execution, Writ of Habeas Corpus and Evidentiary hearing in the State District Court.[2] Loyd's Petition was denied without an evidentiary hearing and Petitioner then filed an application for a Stay of Execution and/or Supervisory Writs and Writ of Habeas Corpus with the Louisiana Supreme Court.

On October 12, 1987, the Louisiana Supreme Court granted Loyd a Stay of Execution and ordered the State District Court to conduct an evidentiary hearing. *State ex rel. Loyd v. Butler*, 513 So. 2d 298 (1987). On November 6, 1987, the Louisiana Supreme Court listed the following

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(footnote 1 continued)

repeating the full procedural history and much of the intricate factual background of this litigation. The facts of the rape and murder are also set forth in the Louisiana Supreme Court Opinion, *State v. Loyd*, 459 So. 2d 498 (La. 1984).

[2] Loyd's claims, as presented in his amended his Petition in the district court are set forth in this court's original Opinion and Order, dated July 27, 1989.

issues to be addressed at the Evidentiary Hearing:

1. Ineffective assistance of counsel;

2. Newly discovered evidence of mental disease or defect;

3. Improper communications by Bailiff and Trial Judge with members of the Jury; and

4. Trial Court's denial of sufficient funds to retain a competent and neutral psychiatrist. *State ex rel. Loyd v. Butler,* 514 So. 2d 446 (La. 1987).

After a seven-day Evidentiary Hearing, the State District Court denied with written reasons the relief sought on Loyd's claims. The court noted that it considered all of Loyd's other allegations in his Petition for Post-Conviction Relief and concluded that all of those issues were previously addressed by the Louisiana Supreme Court in its two prior *Loyd* opinions. *See* Petition, Appendix CC, April 14, 1988 Judgment and Reasons for Ruling.

In July 1988, Loyd then applied to the Louisiana Supreme Court for a continuance of the Stay of Execution, Supervisory Writs and a Writ of Habeas Corpus. The Louisiana Supreme Court denied this application on November 11, 1988. *State ex rel. Loyd v. Butler,* 532 So. 2d 758 (La. 1988).

In March, 1989, Loyd filed with the State District Court a Second Petiton for Post-Conviction Relief. Petitioner also filed a Motion for Production of Initial Police Reports, Motion to Provide Funds for Expert Assistance, Motion for Evidentiary Hearing, and Motion to Recuse and to Stay Execution. On March 13, 1989, the state court ruled that the Motion to Recuse was moot and denied the

Petition for Post-Conviction Relief as well as the other Motions without a hearing. On March 15, 1989, Loyd applied to the Louisiana Supreme Court for a Supervisory Writ, Writ of Habeas Corpus, Evidentiary Hearing and a Stay of Execution. On March 20, 1989, the Louisiana Supreme Court denied Loyd's application without written reasons. *State ex rel. Loyd v. Butler,* 539 So. 2d 639 (La. 1989).

On March 31, 1989, Loyd filed in this court a Petition for Post Conviction Relief, Writ of Habeas Corpus, Evidentiary Hearing and a Stay of Execution as well as Motions to Provide Funds for Expert Assistance, for an Evidentiary hearing, and a Writ of Mandamus to Compel Production of the Initial Police Reports. Loyd's petition asserted twenty-nine separate grounds for relief. On March 31, 1989, this court ordered that Loyd's execution be stayed pending disposition of his Petition. This court, after fully considering the Petition, the State's response, the voluminous record which includes transcripts of the guilt/innocence trial, the second sentencing trial and the evidentiary hearing, as well as the voluminous written psychiatric and psychological reports, and the applicable law, denied Loyd's Petition.

Petitioner then appealed to the Fifth Circuit Court of Appeals, which reversed this court's opinion and remanded for further consideration on the issue of Loyd's claims of ineffectiveness of counsel at the second sentencing trial. The Fifth Circuit held that this court failed to give proper deference to the State District Court's factual findings in the Evidentiary Hearing which considered the Petitioner's claim of ineffectiveness of counsel. *Loyd v. Smith* 899 F. 2d 1416, 1427 (5th Cir. 1990). The state court found that Loyd's attorneys were ineffective at the second sentencing hearing, but that Loyd did not affirmatively prove prejudice. This court had held that counsel were not ineffec-

tive, and that Loyd did not affirmatively prove prejudice. In reversing the Circuit held that "[t]he district court must afford proper deference to the state court's factual findings when evaluating the prejudice prong of *Strickland*, and conduct an evidentiary hearing if the district court concludes that the record is not fully developed as to this issue." *Id.*

STATE DISTRICT COURT OPINION

The State District Court's Judgment and Reasons for Ruling of April 14, 1988 (hereinafter referred to as "State Court Opinion") was based upon an Evidentiary Hearing which was held on November 7, 1987, January 20, 21, 22, and 28, 1988, and March 17, 1988. The state court considered the following claims by Loyd: (1) Ineffective assistance of counsel; (2) Newly discovered evidence of mental disease or defect; (3) Improper communications by bailiff and trial judge with members of the jury; and (4) Trial court's denial of sufficient funds to retain a competent and neutral psychiatrist. The state court denied relief, and this court will now discuss the State Court Opinion as to the claims of ineffectiveness of counsel.

The State District Court, with Judge Caire presiding, found that, in regards to the ineffectiveness claim, that Loyd's counsel had sufficient funds to employ a neutral psychiatrist. The court also found that Loyd's sanity[3] was a critical issue in the case, and that counsel were aware of that fact. Judge Caire wrote that:

... Mr. Allison [the lead counsel of Loyd's defense

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[3] While the court noted that the sanity of the defendant was a crucial issue in the case, the court's real inquiry, as will be discussed later, was whether Loyd's counsel should have developed additional mitigating psychiatric testimony.

> team at the 1985 Second Sentencing Trial] made several half-hearted attempts to procure such services, but eventually abandoned those efforts. Mr. Hackman testifies that he also considered the need for psychiatric testimony but did not pursue it. He states that he did not do so because the psychiatric information he had from the Sanity Commission and the East Feliciana Hospital led him to believe that the insanity defense would not prevail. He further admitted, however, that his consideration of this issue was based only on the M'Naghten [sic] Rule, i.e., whether at the moment of the crime petitioner could distinguish right from wrong. He admitted that he did not realize that the mitigating factors of "mental or emotional disturbance," or "mental disease or defect" provided in La. Code Crim. Pro. Art. 905.5 (b) and (e), would be admissible at the sentencing phase, even if this evidence did not meet the M'Naghten [sic] test for insanity. State Court Opinion, pp. 4-5.

The state court also questioned the accuracy of the testimony of Mr. Allison, who claimed that he lacked the requisite experience to handle the case, and that he did not effectively handle Loyd's 1985 trial.[4] The court stated "that at least in the case of Mr. Allison, his personal abhorrence of the death penalty might well have affected his later assessment of his conduct at the resentencing hearing." *Id.* at 5. The court, however, found "no reason to discount [Hackman's] testimony that he simply did not understand the difference between the M'Naghten Rule and mitigating circumstances of mental disease or defect." State Court Opinion, p. 5. The court concluded that the most "compelling fact in the performance of counsel in this

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[4] The testimony of Mr. Allison at the Evidentiary hearing will be discussed in depth by this court later in this Opinion.

matter is that they simply failed to develop independent psychiatric evidence of mental disease or defect in a death case where this line of investigation was clearly indicated." *Id.* As such, Judge Caire concluded that the failure to seek another psychiatric evaluation "was an error which fell below the professional standards of conduct required to constitute proper representation of the defendant." *Id.*

In considering the prejudice prong of *Strickland*, the court found that there was not a reasonable probability that the alleged newly discovered evidence of mental disease or defect would have changed a juror's mind as to the proper sentence. The State Court Opinion found that the new psychiatric testimony was based upon certain assumptions which were unproven at trial, and that the jury would not have been influenced by this speculative psychiatric testimony due to the particularly heinous nature of the crime.

The state court discussed the Evidentiary Hearing testimony of defense psychiatrists Drs. Honor, Scanlon, and Sanchez, as well as the rebuttal evidence offered by Drs. Ritter, Cox, Fain, St. Martin. In considering the testimony, Judge Caire found that Loyd's team of psychiatrists "based their opinions on a number of hypothetical facts which in this court's opinion were never established." *Id.* at 9. Specifically, petitioner's psychiatrists based their testimony on assumptions that Loyd had been drugged before the commission of the crime, Loyd worked unusually long hours in excessive heat in the days immediately preceding the crime, and that Loyd suffered a concussion on a boat ride on the afternoon before the crime. Absolutely none of these facts had been established. Additionally, the court noted that "while there was general agreement by the experts that petitioner exhibits clinical signs of some physical irregularity [sic] in his

frontal lobe brain functions, no more than a suspicion was indicated, even by his own experts, that this irregularity explained or excused the crime." *Id.* at 10 (emphasis added). The court concluded that the "enormity of the crime committed was so great that any mental disease or defect, short of legal insanity, would simply not, in this court's opinion, have tipped the balance in any jurors mind so as not to warrant a sentence of death." *Id.* at 11.

LEVEL OF DEFERENCE REQUIRED IN HABEAS PROCEEDINGS

The Fifth Circuit held that this court failed to give the proper deference required in a habeas proceeding to the state court's factual findings.

Habeas proceedings are governed by 28 U.S.C. §2254 (1982). Subsection (d) provides that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction ... shall be presumed to be correct." The statute delineates eight circumstances when a federal district court on review can negate the presumption that a state court's factual determinations are correct. These circumstances are as follows: (1) when the merits of the dispute were not resolved by the state hearing; (2) the state procedure was not adequate to provide a full and fair hearing; (3) the material facts were not adequately developed at the state hearing; (4) the state court lacked jurisdiction over the person or subect matter; (5) an indigent applicant was not appointed counsel; (6) the applicant did not receive a full, fair, and adequate hearing; (7) the applicant was otherwise denied due process; and (8) the applicant produces the state record and the federal court concludes that the evidence was insufficient to fairly support the factual determination.

In addition to the eight statutory exceptions to the presumption of correctness for state court factual findings, the Fifth Circuit has explicitly recognized that "there are situations when it is appropriate for a federal court to substitute its judgment on factual issues for that of the state court, even on habeas corpus review." *Smith v. Black*, 904 F. 2d 950 (5th Cir. 1990). *See also Buxton v. Lunaugh*, 879 F. 2d 140, 142-47 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3295 (1990). The United States Supreme Court has held that a state court's factual determinations can be overturned by a federal court if the federal court concludes that the state court's "factual determinations were not supported by the record" or if those finding are "erroneous." *Sumner v. Mata*, 449 U.S. 539, 101 S. Ct. 764, 770-71 (1981).

In *Strickland v. Washington*, 466 U. S. 668, 104 S. Ct. 2052 (1984), the Court expressly delineated the correct level of deference under §2254(d) to claims of ineffective assistance of counsel. The Court ruled:

> Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," [citations omitted]. Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. ... Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement to §2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil procedure 52(a), both the performance and prejudice components of the ineffectiveness in-

quiry are mixed questions of law and fact. *Id.* at 700, 104 S. Ct. at 2070 (emphasis added).

Prior to *Strickland*, in *Sumner v. Mata*, 449 U.S. 539, 101 S. Ct. 764 (1981), the Court held that under §2254(d) a federal judge may "overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question" *Id.* at 544, 101 S. Ct. at 767. Post *Strickland* cases have made it clearer that only state court factual findings are entitled to deference. In *Miller v. Fenton*, 474 U.S. 104, 106 S. Ct. 445 (1985), the Supreme Court held that the voluntariness of a defendant's confession is not an issue of fact presumed to be correct under §2254. The Court clearly delineated between deferring to questions of fact, as opposed to conclusions of law. *Id.* at 114, 106 S. Ct. at 451. The Court noted, however, that "[i]n the §2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Id.* After discussing the distinction between questions of law from questions of fact, the Court held that the admissibility of a confession merits treatments as a legal inquiry "requiring plenary federal review." *Id.* at 452.

Fifth Circuit precedent has also consistently held that deference is required only to "specific predicate factual findings... ." *Mattheson v. King*, 751 F. 2d 1432, 1438 (5th Cir. 1985), *cert. dism'd*, 475 U.S. 1138 (1986). *See also Marin v. McCotter*, 796 F. 2d 813, 817 (5th Cir. 1986), *cert. denied*, 479 U.S. 1057 (1987); *Ricalday v. Procunier*, 736 F. 2d 203, 206 (5th Cir. 1984). The Eleventh Circuit has also distinguished between deference to facts, as opposed to legal conclusions. *See e.g., Huckelbury v. Wainwright*, 781 F. 2d 1544, 1545 (11th Cir. 1986) (voluntariness of a confession); *Price v. Wainwright*, 759 F. 2d 1549, 1551-52 (11th Cir. 1985) (competency to stand trial is a mixed question of law and fact).

Thus, while this court is obligated under §2254(d) to defer to the state court factual findings, it is not bound by the legal conclusions reached by the state court. A state court's legal conclusion of ineffectiveness is not a finding of fact, it is a conclusion of law which requires full plenary federal review. *See Strickland,* 104 S. Ct. at 2070; *Miller,* 106 S. Ct. at 451.

INEFFECTIVENESS OF COUNSEL CLAIM— THE STRICKLAND CRITERIA

In *Strickland* the respondent pled guilty in a Florida trial court to three capital murder charges. In preparing fo the sentencing hearing, the defendant's attorney spoke with him about his background, but did not seek out character witnesses or request a psychiatric examination. Counsel's decision not to present evidence concerning respondent's character and emotional state reflected his strategic judgment that it was advisable only to rely on the plea colloquy, since this tactic would prevent the state from cross-examining the respondent and from presenting its own psychiatric testimony. Additionally, defense counsel did not request a presentence report since it would have included the defendant's criminal history. The trial judge sentenced the defendant to death.

The Court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 2064. In order to satisfy this standard, a petitioner must meet the following two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing

> that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* at 687, 104 S. Ct. at 2064.

The *Strickland* Court also held that

> Judicial scrutiny of counsel's performance must be highly deferential. It is all to tempting for a defendant to second-guess counsel's assistance after a conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide-range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Id.*, 104 S. Ct. at 2065 (citations omitted).

Turning to the facts of the case, the *Strickland* court addressed the circumstances surrounding the Petitioner's defense and ruled that the defendant had not demonstrated ineffective assistance of counsel. The Court found that counsel's decision not to search for more character witnesses or psychological evidence was reasonable, and that counsel made a reasonable strategic choice to argue for extreme emotional distress as a mitigating circumstance. *Id.* at 2070. As such, the Court concluded that trial counsel's performance was the "result of reasonable professional judgment." *Id.* at 2071.

Regarding the prejudice prong of the test, the court noted that in order to succeed, a defendant must "**Affirmatively prove prejudice.**" *Id.* at 2067. to prove prejudice, the defendant "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 2068.

The Court concluded that under the facts of the case the "evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge." *Id.* The Court thus concluded that "[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." *Id.*

Strickland indicates that a court should not second guess defense counsel's strategic and tactical decisions. Also, the *Strickland* decision establishes that a criminal defendant is not entitled to the best possible, or even a better defense. Instead, a criminal defendant is entitled to assistance of counsel that is objectively "reasonable con-

sidering all the circumstances." *Strickland*, 104 S. Ct. at 2065. So long as counsel's performance does not undermine the "proper functioning of the adversarial process [such] that the trial cannot be relied on as having produced a just result" (*id.* at 2064), a court reviewing counsel's performance in hindsight should defer to the strategic choices made by counsel.

Other circuit court decisions confirm that a criminal defendant has a difficult burden in establishing a successful claim of ineffective assistance of counsel. In *Roach v. Martin*, 757 F. 2d 1463 (4th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985), the Fourth Circuit considered the claim of a prisoner who was convicted of aggravated rape and murder. On sentencing the trial found the following aggravating circumstances: (1) murder committed while in the commission of rape; (2) murder committed while in the commission of kidnapping; (3) murder committed while in the commission of armed robbery. The judge also found the following mitigating circumstances: (1) defendant had no significant history of prior criminal activity involving the use of violence; (2) the murder was committed while he was under the influence of mental or emotional disturbance; (3) defendant acted under duress or under the domination of another; (4) his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (5) the defendant was suffering from mental retardation; (6) defendant had an antisocial personality disorder; and (7) defendant was below the age of 18 at the time of the crime. *Id.* at 1468. The sentencing judge concluded that notwithstanding the existence of these aggravating circumstances, the defendant deserved the death sentence.

In his habeas petition the petitioner argued that counsel was ineffective when the prisoner pled guilty, and that counsel was ineffective at the sentencing phase of the

trial. The petitioner claimed that his attorney did not conduct an adequate investigation into what drug the defendant had ingested and that counsel failed to investigate whether the prisoner had Huntington's Disease ("HD"). As such, the petitioner claimed that his counsel failed to present a defense based on insanity, involuntary intoxication or drug use, and that counsel did not present this evidence in mitigtion.

The court held that prisoner's claim based upon insanity was groundless since his counsel had retained a psychiatrist who examined the defendant and determined that the prisoner was competent to stand trial and was sane at the time of the offenses. Based upon this psychiatrist evaluation, the defendant's attorney concluded that there was no basis for the M'Naughton rule insanity defense. Regarding the prisoner's contention that counsel should have explored the possibility of HD and the effects of the drugs on the defendant, the court held: "Implicit in this argument is the fact that present counsel would have us hold that trial counsel had an affirmative duty to shop around for another psychiatrist who would have found [defendant] to be insane. We have previously excluded such claims." *Id.* at 1477.

Fifth Circuit jurisprudence elucidates that this Circuit has rejected claims of ineffectiveness when counsel's actions were based upon reasonable strategic and tactical decisions when considered at the time that counsel made these decisions, and not when considered with the benefit of hindsight. The jurisprudence also indicates that the Fifth Circuit does not find ineffectiveness when a defendant shows that his defense could have been better than it was originally, so long as the defense was constitutionally adequate and reasonable under the circumstances.

In *Brogdon v. Blackburn*, 790 F. 2d 1164 (5th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987), the defendant was

convicted of murder and aggravated rape, and was sentenced to death. The petitioner contended that his trial counsel was ineffective since his attorney failed to call several witnesses to testify on the defendant's behalf during the sentencing phase of his trial, and also because the lawyer failed to investigate the existence of a blood alcohol test which the state had taken of the defendant.

Petitioner argued that members of his family should have been called as additional witnesses in the sentencing portion of his trial. These witnesses would have "testified as to the harsh and difficult nature of Brogdon's [the defendant] childhood and to positive attributes of his personality." *Id.* at 1169. The Circuit dismissed this argument since this type of evidence was presented to the jury, and thus additional witnesses would have been merely cumulative. The court concluded, therefore, that "the decision of Brogdon's attorney not to call these witnesses could well have been a proper exercise of professional judgment." *Id.*

In *Willie v. Maggio,* 737 F. 2d 1372 (5th Cir. 1984), *cert. denied,* 469 U.S. 1002 (1984), the prisoner was convicted of murder, sentenced to death, and argued in his habeas petition, *inter alia,* ineffective assistance of counsel during the sentencing phase of his trial. Specifically, the petitioner argued ineffectiveness based on three alleged errors of counsel: (1) failure to move for a change of venue; (2) failure to object to prejudicial remarks made by counsel during the closing argument; and (3) failure to produce evidence of mitigating factors during sentencing. As for the failure to present mitigating evidence, the prisoner claimed that his attorney should have presented evidence of his poor childhood, his drug addiction, and an affidavit from a psychiatrist who never examined the defendant which would have opined as to mitigating evidence regarding the defendant's mental state.[5]

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[5] The court's opinion does not state what the affidavit would have said.

In rulling the court only considered the prejudice prong of *Strickland,* and found that the petitioner had not proven prejudice. The court found that the jury's verdict would not have been altered by testimony about the defendant's "troubled adolescence." *Id.* at 1394. The court then recited the graphic nature of the rape and murder, the taped confession, and that the defendant showed little remorse for the crime. *Id.*

LOYD'S INEFFECTIVENESS CLAIM

The State District Court, after the Evidentiary Hearing, found that counsel was ineffective at the second sentencing trial. In so ruling, the state court made the following findings of fact:

1. Loyd's counsel at the 1985 Sentencing Trial had sufficient funds to have employed a neutral psychiatrist.

2. Loyd's sanity was a critical issue in the case, and counsel were aware of this fact.[6]

3. Mr. Allison, the lead counsel at the second sentencing trial, made several "half-hearted" attempts to procure another psychiatrist, but he abandoned those efforts.

4. Mr. Hackman, who acted as assistant counsel at the second sentencing trial, considered the need for psychiatric testimony, but he did not pursue it since he believed the insanity defense would fail.

5. Mr. Hackman's decision, however, was based only upon the M'Naughton Rule, and Mr. Hackman did not realize that the mitigating factors of "mental or emotional disturbance" or "mental disease or defect", as provided in La.

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[6] The State District's Court finding that sanity was a crucial issue in the 1985 Sentencing Trial seems to call into question the guilt/innocence phase of the trial since Loyd's counsel unsuccessfully presented a defense based on insanity. This court concludes that to the extent that the State District Court discussed the issue of sanity as part of his findings at the Evidentiary Hearing, Judge Caire was, in actuality, referring to the issue of Loyd's mental condition and to the existence of statutory mitigating psychiatric evidence.

Code Crim. Pro. art. 905.5(b) and (e)[7], would be admissible at the sentencing trial.

6. The state court questioned the accuracy of Mr. Allison's testimony that he did not effectively represent Loyd, finding that Allison's "personal abhorrence of the death penalty might well have affected his later assessment of his conduct at the resentencing hearing." State Court Opinion, p. 5

7. The court found no reason to discount Mr. Hackman's testimony that he did not understand the difference between the M'Naughton Rule and mitigating circumstances of mental disease or defect.

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[7] La. Code Crim. Pro. art. 905.5 (West 1984) provides in full:

> The following shall be considered mitigating circumstances:
> (a) The offender has no significant prior history of criminal activity;
> (b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
> (c) The offense was committed while the offender was under the influence or under the domination of another person;
> (d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;
> (e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
> (f) The youth of the offender at the time of the offense;
> (g) The offender was a principal whose participation was relatively minor;
> (h) Any other relevant mitigating circumstance.

Loyd's argument for ineffectiveness is based largely on the premise that counsel failed to develop any evidence of mental disease or defect, a mitigating circumstance under subsection (e). Loyd's argument implies that counsel did not present any evidence of these statutory mitigating factors to the jury at the 1985 Sentencing Trial. As will be discussed throughout this opinion, counsel did indeed present significant amounts of statutory mitigating evidence on Loyd's behalf during the trial.

8. The court found as the most "compelling fact in the performance of counsel in this matter is that they simply failed to develop independent psychiatric evidence of mental disease or defect in a death case where this line of investigation was clearly indicated." State court Opinion, p. 5. The court concluded that this failure of counsel was "an error which fell below the professional standards of conduct required to constitute proper representation of the defendant." *Id.*

This court, in accordance with the deference requirement mandated by §2254(d) defers to these facts and will accept these facts and any inferences drawn by the State District Court to the extent that they are supported by the record and are not erroneous. However, as discussed *supra*, this court must make its own legal determinations in applying the facts to the applicable law. *See Strickland*, 104 S. Ct. at 2070; *Miller v. Fenton*, 474 U.S. 104, 106 S. Ct. 445, 451-53 (1985).

In order to rule properly on Loyd's claim of ineffectiveness, this court has reviewed in detail the underlying facts of Loyd's representation, the testimony at the Evidentiary Hearing, and the psychiatric testimony in this matter. After having reviewed the entire record, the court finds that Judge Caire's findings of fact, numbered one, two, three, and six in this court's Opinion, pp. 19-20, are clearly supported by the record. This court hereby defers and accepts these particular factual findings. As for the other factual findings, this court will specifically point out which state court factual findings have support in the record and are not clearly erroneous, which findings do not have support in the record and which are irrelevant. Additionally, the court will make its own necessary factual findings, which will supplement but not supplant the findings made by the state court.

SUPPLEMENTAL FACTURAL FINDINGS

A. *Guilt/Innocence Trial*[8]

At the guilt/innocence phase of the trial, the court appointed attorneys Gordon Hackman and Randy Lewis to represent Loyd. The defense was insanity. Loyd's mother gave Hackman $2000.00 before the trial to conduct an independent psychiatric evaluation of Loyd. Hackman used $750.00 of this money to retain Dr. C. B. Scrignar, a pschiatrist whom Hackman had "used for several years." *See* Hackman's Testimony at the Evidentiary Hearing, January 20, 1988, p. 147. Hackman made the strategic decision not to call Dr. Scrignar at the guilt/innocence phase of the trial since Scrignar, like Drs. Ritter and St. Martin of the Sanity Commission, also found that under the prevailing rules Loyd was sane at the time of the crime.. *Id.* at 147-48; *see also* Lewis' Testimony at the Evidentiary Hearing, January 20, 1988, pp. 188-89.

Hackman did call, however, Dr. Cox, who testified in regards to Loyd's mental condition at the guilt/innocence phase. Cox stated that Loyd underwent extensive psychological testing, and that Loyd had been examined by neurologists. The doctor testified that none of the physicians who examined Loyd could find any indication that Loyd suffered from any mental illness or mental disease. Cox also testified as to the effect of certain mitigating factors (intoxicatioin, exhaustion, possible drug infestion, etc) which, had they been proven at trial, could have effected Loyd's behavior. *See* Testimony of Dr. Cox, Trial

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[8] While this Opinion is only addressed to Loyd's claim of ineffectiveness at the 1985 Sentencing Trial, the court will briefly discuss the psychiatric testimony presented at the guilt-innocence phase in order to present fully the psychiatric evidence known to Loyd's counsel at the 1985 Sentencing Trial.

Transcript, Vol. IX of X, pp. 271-90.

B. *1985 Sentencing Trial*

Loyd's insanity defense did not prevail, and at the 1985 Sentencing Trial, Hackman and Lewis were joined by attorney William T. Allison. Allison was not appointed by the court; instead he was added to the defense team at the request of the Louisiana Coalition of Jails and Prisons. Prior to the sentencing trial, Allison moved the court to compel the State to provide funds for the employment of expert witnesses and an investigator. *See* Original Motion and Supplemental Motion filed by Allison, Sentencing Transcript, Vol. 1 of 6, pp. 21-22 and 70-73. The court allowed $600.00 for a psychiatric evaluation. *See* Sentencing Transcript, Vol. 1 of 6, pp. 8-9.[9]

Allison did not retain a new psychiatrist for the second sentencing trial. Allison, however, presented *significant mitigating psychiatric evidence* at the trial by calling the following three medical doctors: (1) Dr. Cox, Loyd's treating psychiatrist; (2) Dr. St. Martin, a member of the Sanity Commission, Coroner of St. John Parish, and Loyd's family's treating physician for several years (*See* Testimony of Dr. St. Martin at the Evidentiary Hearing, March 17, 1988, pp. 4-9.); and (3) psychiatrist Dr. Ritter, the second member of the Sanity Commission. Allison also introduced into evidence Loyd's Feliciana Medical Records, which were shown to the jury during the sentencing proceedings. *See* Sentencing Transcript, May 9, 1985, Vol. 5 of 6, pp. 263-64.

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[9] At the Evidentiary Hearing in 1988, Hackman testified that he did not remember telling Allison about the $1250.00 remaining from the $2000.00 advanced by Loyd's mother prior to the guilt/innocence trial. *See* Hackman's Testimony at the Evidentiary Hearing, January 20, 1988, pp. 126-27.

In questioning Dr. Cox at the 1985 Sentencing Trial, Allison read the following summary portion of the Feliciana Report:

> If Mr. Loyd did in fact commit the offense, the probable etiology of the crime was as follows: Mr. Loyd was himself a victim of child abuse and he had a very poor model for adult masculine behavior. He was not able to integrate the antisocial patterns of behavior he learned from his father with the excessively moralistic standards he was taught by his mother. One consequence of this confusion was that he had not attained a stable adult sexual adjustment and another consequence was that he developed a pattern of substance abuse. During the weeks preceding the crime. Mr. Loyd was subjected to unusual stresses. Also, he had built-up hostility and had no effective way of discharging it. Consciously or unconsciously, he probably had been experiencing a desire to interact sexually with an immature female. On the day of the crime, his intoxication rendered his inhibitions ineffective. Apparently, he committed the crime cognizant of the wrongness of it, but unwilling or unable to stop himself. Later, overwhelmed by horror over his actions, he avoided memory of the event. Testimony of Dr. Cox at Sentencing Phase, Sentencing Transcript, Vol. 5 of 6, pp. 199-222 (emphasis added).

The court finds that the evidence presented in this report to the jury clearly falls within the ambit of Louisiana's statutory mitigating circumstances, La. Code Crim. Pro. art. 905.5 (West 1984). Specifically, this evidence presented to the jury indicates that Loyd was emotionally distrubed (905.5(b)), and that Loyd was intoxicated (905.5(e)). Additionally, the other testimony regarding Loyd's history of

substance abuse and that he had been a victim of child abuse qualifies as "other relevant mitigating circumstances" under art. 905.5(h).

Dr. Cox also orally testified about other mitigating circumstances regarding the crime:

> A. I think it's very clear that [Loyd] developed a pattern of substance abuse. As far as stable adult sexual adjustment, I can't comment on that.
>
> * * *
>
> I think there are certain things that child abuse predispose[s] people to. It can predispose problems with sexual adjustment.
>
> * * *
>
> Q. ... let me read that to you [from the Feliciana report], "in general Mr. Loyd is a gentle and compliant person, he tends to control his anger and hostility. Since he does not permit himself to express ... aggressive feelings the danger exists that they might build-up to an uncontrollable level and be discharged explosively." Do you agree with those statements?
>
> A. Yes, sir. As I indicated earlier our observations of Mr. Loyd at the institution were that he was a gentle and compliant person while there. And I think it's true, as with most of us, that if anger builds up there's always a risk that we can explode.
>
> Q. Now, Dr., the history that you took, or that was taken in your, at your direction included the

history of child abuse?

A. Yes, sir.

* * *

A. I think that abuse of a person as a child predisposes that person as an adult to be violent, abusive, towards others. Either his own children, or other people with whom they might come in contact. I have done many evaluations for the courts. And I have found and I think a very high percentage of people who commit volent acts that they do have history of abuse as children.

Q. [I]s [Loyd's inability to express his hostility] a normal consequence of child abuse and the kind of experiences that he, that you understand he experienced in early childhood?

A. Yes, sir. In general if you're going, if you express your emotions or your anger and you're going to be beaten severely for it you learn to bottle it up and not express it.

* * *

Q. Now, what happens to a person who continues to repress and, and close in, hold in these emotions?

A. Usually trouble occurs. They explode sometimes and have an outburst of anger and destructiveness. Sometimes they become depressed. Sometimes they engage in the abuse of drugs and alcohol as a way to try to neutralize or make themselves feel better.

Q. Is it, is it fair to say that a person like this is

kind of like a time bomb —

A. Yes, sir.

Q. ... that's ticking away...

A. Many times, it's fair to say, yes, sir.

* * *

Q. Now, of course, you're aware that Mr. Loyd was determined to be sane at the time of the commission of the offense.

A. Yes, sir.

Q. Now, the term sanity or sane or insane really has no significance in your profession, does it, other than a legal sense?

A. Well, sanity is not a medical term, it's a legal term. And the test is a legal test. And so from our point of view it's important when we have to come to courtroom and give testimony. But from the aspect of trying to understand behavior it's not that important to use.

Q. Saying that someone is sane is not the same as saying that he is completely free from any abnormalties?

A. No, sir, it's not.

Q. Doctor, in a person like Alvin Scott Loyd who you say was kind of like a time bomb waiting to, to, or I said and you agree, that he was kind of like a time bomb waiting to go off, what kind of stimulus would trigger his going off, blowing up?

A. Different things. Of course, stress, pressure, substance abuse such as alcohol, certain drugs we know predispose[s] people to do things.

Q. Can you tell us which drugs ... ?

A. Pensicadene (spelled phonetically) especially PCP, Angel Dust, is a drug that's particularly known to make people react violently.

Q. And is that violent reaction only when they're taking it or is there some history people taking it one time and something happens some, some long time later?

A. Well, the drug is stored in the body tissue so that you can have trouble with it even if you haven't taken it for awhile because it's still stored in your body tissues ... .

Q. How about sleep deprivation?

A. Sleep Deprivation does impair impulse control.

Q. Now, if a, if a person has these personality characteristics and then is experiencing the stimulus, whatever it may be, whether it be drugs or alcohol, sleep deprivation, or some other kind of stress, or a combination of those, is it, is he apt to lose his ability to control these impulses?

A. It's a possibility, yes, sir.

Q. Is Alvin Scott Loyd typical in your experience as a person who commits a violent crime like ... .

A. No, sir, he's not typical. There's some atypical things about him.

Q. Would you tell the jury, please, what those atypical things are?

A. This crime occurred when he was twenty-five years of age. And people who do commit violent acts it's my experience that usually by the age of twenty-five they have established a track record previously of aggressive behavior, physical abuse of others, getting in trouble with the law. [Loyd] did not have a long Rap sheet, history of previous arrests. He did not have a history of abuse of his own children, or getting in fights, or attacking people, or violent behavior. And so the fact that this occurred, this act occurred at age twenty-five, this suddenly and precipitously, to me was unusual and atypical and I cannot explain it.

* * *

Q. Would you find that [Loyd's lack of memory] would be consistent with his personality profile as you understand it to be?

A. I have a couple of thoughts about that. Number 1, a person who's amnesic because of substance abuse, alcohol or drugs, is usually totally amnesic, there's no patch which you remember and the rest is blank, you're amnesic for the whole thing. I believe that his difficulty in memory is, you know, we're assuming that it, you know, a lot of this is genuine amnesia, and that was a question we had when we evaluated him, how much of his lack of memory was genuine and how much was due to the fact that he chose to blot simply because he has to have a terrible time confronting what had happened and what he had done. And I still believe that's a large part of this. It's just very hard for him to acknowledge on a conscious level what he had done.

Q. And is that because of the genuine remorse and sorrow he feels?

A. Many reasons, that's part of it. Testimony of Dr. Cox at Sentencing Phase, Sentencing Transcript, Vol. 5 of 6, pp. 199-222.

Allison also called Drs. St. Martin and Ritter at the sentencing trial. Both of these doctors found Loyd to be legally sane, but they testified that Loyd was genuinely remorseful. *See* Testimony of Dr. St. Martin and Ritter at Sentencing Phase, Sentencing Transcript, Vol. 4 of 6, pp. 109-16 and 221-32. Dr. Ritter also testified that a finding that Loyd was legally sane did not mean that Loyd was perfectly normal. *Id.* at 227.

In reponse to the plethora of mitigating testimony presented by the defense, the State called absolutely no psychiatric witnesses at the 1985 sentencing trial. The State only called Dr. St. Martin in his capacity as a coroner. As a state witness, Dr. St. Martin only testified as to the victim's cause of death. *See* Testimony of Dr. St. Martin at Sentencing Phase, Sentencing Transcript, Vol. 4 of 6, pp. 106-07.

This court finds that Loyd's counsel presented significant statutory mitigating psychiatric testimony on behalf of Loyd at the 1985 Sentencing Trial. Specifically, Loyd's counsel presented evidence that falls within the ambit of subsection (a) (no significant prior history of criminal activity), subsection (b) (offender under the influence of mental or emotional disturbance), subsection (e) (offense committed under the influence of alcohol)[10], and subsec-

[10] Although the Feliciana Report states that Loyd's intoxication at the time of the crime rendered his inhibitions ineffective, the court notes that Loyd's counsel did not prove at the 1985 Sentencing Trial that

tion (h) any other relevant mitigating evidence).

The State District Court's found as the "most compelling fact ... that [Loyd's counsel] failed to develop independent psychiatric evidence of mental disease or defect in a death case where this line of investigation was clearly indicated." State Court Opinion, p. 5. This factual finding connotes that Loyd's failed to develop and present mitigating psychiatric evidence. While the mitigating psychiatric testimony at trial did not characterize Loyd's psychological condiction by the use of the legal buzzwords "mental disease or defect," this court finds that petitioner's attorneys undisputably presented significant statutory mitigating evidence of Loyd's mental condition to the jury at the 1985 Sentencing Trial. As such, to the extent that the state court implied, in finding number eight

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(footnote 10 continued.)

Loyd's counsel did not prove at the 1985 Sentencing Trial that Loyd was intoxicated. Indeed, the state introduced evidence to show that Loyd was not drunk. For instance, Mr. Albert Poche, Sr., testified at the 1985 Sentencing Trial that Loyd wasn't drunk or anything like that ... but he was pretty lively..." when Loyd left the camp. *See* Testimony of Albert Poche, Sr., Second Sentencing Trial Transcript, p. 200, line 27-8, p. 201, line 1-5. Also, Deputy Johnson, who stopped Loyd while he was driving his truck immediately prior to the crime, gave Loyd a field sobriety test. Johnson testified:

> And at that time, after, we gave him what we call a feld sobriety test. Okay. We explained to him carefully to walk straight down the yellow line. First of all, we explained to him to follow all our commands until we tell him the tests were completely over. Okay. Walk the yellow line until we yell and tell him to turn around. Normally if a person is intoxicated when you yell for him to turn around they, they normally trip. He turned around, he passed that part with flying colors. Okay. We told him to come directly towards us. Okay. He came back directly towards us.... *See* Testimony of Duputy Johnson, Second Sentencing Trial Transcript, Vol. III, p. 48.

Additionally, Loyd beat Mr. Poche in a game of pool at the bar. *See infra*, fn. 39.

(*supra*, p. 20), that no statutory mitigating circumstances were presented on Loyd's behalf at trial, this court finds that such a conclusion is not supported by the record and is clearly erroneous.[11]

Significantly, this court finds that the new experts called on Loyd's behalf at the Evidentiary Hearing, namely Drs. Honor, Scanlan, or Sanchez, did not use the legal buzzwords "mental disease" or "defect" in their diagnosis. As will be discussed later in this Opinion, (*see infra*, pp. 68-81), Dr. Honor testified as to the possibility of frontal lobe brain impairment, and Drs. Sanchez and Scanlon testified that Loyd may have been having a psychotic episode with a diminished capacity to distinguish between right and wrong at the time of the crime. Loyd's new cousel, in brief before this Court, characterized this new testimony as fitting within the definition of "mental disease" or "defect." Since Dr. Cox testified that he felt that Loyd may have *minor brain damage,* and the Feliciana Report also mentions that possibility (*see infra* p. 65), the court finds it incongruous that Loyd's new counsel would claim that the testimony of Dr. Cox and the Feliciana Report was inadequate even though that testimony is substantially similar to Dr. Honor's theory of *minor brain damage,* which he labels as possible frontal lobe dysfunction.

EVIDENTIARY HEARING

1. *Testimony of Attorney William Travis Allison*

Mr. William Travis Allison ("Allison") testified on

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[11] The State District Court's literal finding that counsel did not develop evidence of a mental disease or defect is not clearly erroneous since the three doctors called on Loyd's behalf did not use those legal buzzwords in their diagnosis. As such, this court defers and accepts this narrow finding of the state court. The real implication of the state court finding (that Loyd's attorneys did not present any psychiatric mitigating evidence), however, is clearly erroneous.

January 20, 1988. Attorney Allison first became involved in the Loyd case in 1985. At that time, he had a practice which was "ninety percent civil, various mix and ten percent criminal." Allison, p. 24. Allison had been in practice for fourteen years, and had "tried five or six criminal jury trials. Perhaps more. I had assisted in one capital case which was a pre-Furman case in 1973 ... ." Allison, p. 25.

Allison was called in to assist in Loyd's defense by the Louisiana Coalitions of Jails and Prisons. Allison, p. 27. This organization recruited attorneys to do pro bono work and post-conviction remedies for convicted felons. Allison, p. 28. He claims that he told the Coalition that he did not feel competent to handle the matter. Allison, pp.29, 32-33. Nevertheless, Allison accepted the position. Allison's office is next door to the Indigent Defender Board's Office, and he prepared for the case by borrowing materials from this office and "did as much research as I was capable of doing on the status of death penalty litigation at that time and throughout the United States." Allison, p. 38.

When Allison accepted the appointment to be Loyd's attorney, he was under the "understanding ... that both of them [Hackman and Lewis] were going to withdraw and I was going to handle it." Allison, p. 39. He then clarified his understanding that he would be Loyd's lead counsel by stating that he talked to Judge Caire and Mr. Hackman, and Allison concluded from these conversations that "one or the other one [meaning either Hackman or Lewis] would probably be left on as to assist me." Allison, p. 40.

Allison sought funds from the state court to hire an investigator. He did so because he felt that the period preceding the crime was crucial to Loyd's defense. Allison, p. 41. He kenw that the defense would be partially based

upon intoxication[12], and he felt that an investigator might help to reveal "[a]nything that a juror might find mitigating." Allison, p. 42. He also made a Motion for Funds to hire a Psychiatrist. He stated: "I wanted to hire a psychiatrist to first examine the records and tell me what needed to be done, if anything. It appeared to me from a layman's view that there was some gaps in the record that just weren't explained." Allison, p. 44. Allison, however, abandoned his attempts to procure another psychiatrist, and, he alleges that he spoke with Dr. Cox only on the day of the trial, for forty-five minutes during the lunch hour. Allison, p. 50.

When asked whether Allison felt that he did an effective job of representing Loyd, Allison responded: "I don't think I added anything to the Defense. I was hampered by my lack of experience. I really in retrospect should not have ever enrolled in this case. And perhaps they would have found someone else more qualified and more competent enough to do it. I was hampered by lack of funds, by geographic distance, and by my lack of experience." Allison, p. 56.

On cross-examination Allison admitted that he had criminal experience and that he had assisted in a capital case (Allison, p. 57), and he admitted that he never told the court that he felt inadequate to represent Loyd. Allison, p. 59. Allison also reiterated that he had participated in at least six criminal jury trials. . 59.[13] He testified: "I tried a

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[12] As discussed earlier in footnote ten, Loyd's counsel did not prove that Loyd was intoxicated at the 1985 Sentencing Trial. In fact, Loyd passed a field sobriety test immediately prior to the crime.

[13] Mr. Allison was not sure as to the exact number of criminal jury trials that he had participated in prior to his representation of Loyd. Allison stated that six was "probably a fair estimate." Allison, p. 60.

second degree murder which was reduced to manslaughter. I tried a manslaughter. I tried an armed robbery. And I assisted in the defense of a capital case in 1973, [and one for] receiving stolen things. I tried one or two narcotics related. One I can remember and I think there may have been another one narcotic related jury trial. I draw a blank now. I don't remember." Allison, p. 60. He further admitted that he felt competent in his handling of these cases. Allison stated, "I guess I did [feel competent]." Allison, p. 60.

When asked why he called Dr. Cox to testify on behalf of Loyd, Allison testified that he called Cox because "at that point he was the only psychiatrist that I was aware of that could say anything at all about Alvin Scott Loyd that would in any way be interpreted as mitigating." Allison, p. 71. After Loyd's case was finished, Allison took on a manslaughter case as a pro bono project. Allison, p. 73.

As for his personal views of the death penalty, Allison testified: "I believe that violence begets violence. And I don't think that you can teach somebody not to kill by killing somebody. I believe that the death penalty is a throw-back to a barbaric age. And that we should be more enlightened and discultered in this day and age than to take someones' life through cold blooded killing." Allison, p. 74. He further stated that he would assist in overturning the death penalty if he ever had the opportunity (Allison, p. 75), and that he represented Loyd primarily because of his opposition to the death penalty. Allison, p. 83.

Allison also stated what effect the Loyd case had on him personally. "Well, I have made a decision that I will no longer do any criminal work as a result of this case. I didn't

feel like I did an adequate job of representing the defendant. I came close to a decison to leaving the legal profession as a result of this case. It drained me emotionally, physically, and financially. I still think the death penalty is wrong." Allison, p. 74.

The state court found that Allison's personal abhorrence of the death penalty might well have affected his later assessment of his conduct at the resentencing hearing." State Court Opinion, p. 5, finding number six, *supra*, p. 19. This court finds that this particular state court finding is amply supported by the record and thus this court defers and accepts the finding. Allison had tried at least six criminal jury trials[14], and assisted in one capital case. He volunteered for Loyd's defense due to his opposition of the death penalty, and he did "as much research as [he] was capable of doing on the status of death penalty litigation..." at the Indigent Board's Office in preparation for the trial. Allison, p. 38. Allison saw his role as the lead counsel in the case, and he never told the court that he felt incompetent to proceed.

2. *Testimony of Gordon Hackman*

While the testimony of Mr. Allison, Mr. Hackman, and Mr. Lewis indicates that Allison was the lead counsel the 1985 Sentencing Trial, the testimony of Hackman and Lewis will be discussed in order to fully develop the issue of ineffectiveness.

When Hackman was appointed to the case, his practice consisted of primarily civil cases, but also some

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[14] Even if Allison was testifying accurately as to his personal criminal jury trial experience, trying six cases indicates that he did indeed have an objectively reasonable level of criminal jury trial experience when he agreed to represent Loyd.

criminal cases. In 1975 through 1979, when Hackman practiced law with attorney Randy Lewis, they had many criminal cases. Hackman stated: "I think it was '75, through '75 or '6 through probably '79 when Randy Lewis and I practiced law together. We had a large volume of all kinds of work in those days. And Randy was very interested in criminal law and so we took on a number of criminal cases. And again, it was rare to have any, I only think there were one or two cases that involved a death, or a murder, or manslaughter, or something like that." Hackman, p. 91.

When he was appointed, Hackman did not wish to represent Loyd. Hackman, p. 97. When asked if his feelings about Loyd's crime effected his representation, Hackman responded, "I don't know. I can't, I can't remember saying to myself well, Gordon this is such terrible business that the guy doesn't deserve representation. So, I don't know. I can't say one way or the other." Hackman, p. 99.

When asked whether he was prepared for the trial, Hackman responded:

> Well, looking back on it ever since that first trial I think we should have done a lot more investigation on the, on who Scotty had been with for the two or three days prior to the date the offense occurred. We should have talked to all of those witnesses I think. I certainly believe we should have had a forensic psychiatrist[15] to assist us in both examining Scotty, examining his records and testifying at trial. I think those are the two

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[15] The court finds highly unusual Hackman's testimony that he should have had a forensic psychiatrist to assist him and to testify at trial. The record unequivocally establishes that Loyd's counsel did call two forensic psychiatrists, Drs. Cox and Ritter, who testified on Loyd's behalf at the 1985 Sentencing Trial. *See* discussion, *infra*, pp. 56-58 of this Opinion.

> main areas that we should have given greater attention to. Hackman, p. 104.

He further lamented that he did not feel competent to handle the case. Hackman, p. 104. In summing up the effect of his representation. Hackman testified as follows:

> Well, I feel I represented the fella, you know. He almost had a hung jury which meant [sic] the first trial would have been a life sentence. And we went to the Supreme Court two times and had the death sentenced reversed. We tried the case again and got a death sentence. And since that time have not been directly involved with whatever except for the appeal to the Supreme Court and going there for the third time. So, the — there is some responsibility there for the guy's lawyers if he has a death sentence I think." Hackman, p. 110.

Hackman testified that he could not obtain a urine test of Loyd immediately following his arrest since "I wasn't around at the time of the arrest. Now, as I recall I came into the file maybe two or three weeks, four weeks after the — after everything had taken place and all this States' investigation and statements and whatever happened." Hackman, p. 112. He also revealed that in 1985 (the time of the second sentencing trial), he also represented John Simms, "who had been charged with murder." "... I was appointed to represent him in post-conviction proceedings which we had a hearing before Judge Chaisson. Might have been manslaughter I'm not really sure. But that was the only other criminal case." Hackman, p. 117.

Hackman also testified as to the events surrounding Mr. Allison's assumption of the role of lead counsel at the

1985 Sentencing Trial. This testimony indicates clearly that Allison was indeed the lead counsel at Loyd's second sentencing trial. Hackman stated as follows:

> ... I did not wish to represent Scott. And I believe it was Judy Menadue or another person as I said that had arranged for Bill Allison to come to be his lawyer. We then filed, Randy and I filed a Motion to Withdraw since Scotty had decided that as I understood it that Bill Allison would be the man to represent him. And Randy and I both wished to withdraw. I believe there was a motion made to the effect and a hearing. And Judge Caire I think had taken the bench by that time and said, well, he would require Randy and me, one of us to stay aboard *and to assist Allison* and with that position. Hackman, p. 116 (emphasis added).

Hackman later reiterated that he first heard about Allison from Judy menadue, who was with the Louisiana Capital Defense Project. Hackman, p. 139. Hackman testified that Allison was responsible for discussing Loyd's case with Dr. Cox prior to the 1985 Sentencing Trial, and Allison was responsible for developing mitigating evidence to be presented to the jury. Hackman, p. 143. When asked directly who was the lead counsel at the second sentencing hearing, Hackman replied, "*Allison.*" Hackman, p. 118 (emphasis added). He elaborated by stating: "[Allison] was suppose to do most of the work and be responsible for handling the case. And then the other persons that were, Randy and I ... whatever. What we were suppose to do was going to be subsidiary to what Bill Allison did. ... I think that was the, Judge Caire's decision at that point. Bill can come in and **be lead counsel** but Gordon and Randy have to stay in and work with him." Hackman, p. 118 (emphasis added). As a result of Allison's role as lead counsel, Hackman testified that he "had less to do in preparation

for the '85 trial'' than he had previously since Allison was handling the case. Hackman, p. 120. Additionally, Hackman expected that his Motion to Withdraw would be granted. He testified:

> Yes, because the Judy Menadue with whatever office she is had arranged for Allison to come in. And I had heard from Scott or from His Mama that Scott knew or was satisfied with Allison and that would be the way, that would be the new lawyer. And that Gordon would not, would be the old lawyer and would have no responsibility. I had sent Bill, of course, copies of whatever the entire record and whatever other pleading had been filed and whatever the Supremes' did on the different occassions[sic]. And a lot of my materials that Randy and I had generated and had prepared as far as evidence and documents and things like that. '' Hackman, pp. 120-21 (emphasis added).

The State District Court focused heavily on Hackman's alleged ignorance of the mitigating circumstances as set forth in art. 905.5. At the Evidentiary Hearing Hackman was asked if he understood the difference between the McNaughten rule for insanity and art. 905.5. on mitigation. Hackman responded: ''I don't think so. If we did, if I did remember that or know it I thought the testimony of his mother on mitigation and his sister on mitigation would be adequate. I don't remember focusing on [905.5].'' Hackman, p. 124. Hackman then recounted that he did indeed have money left over from the funds which Loyd's mother gave him to retain a psychiatrist earlier in the representation. He testified that he did not tell Allison of the funds remaining. Hackman, pp. 126-27.

As for his knowledge of Loyd's psychological condition, Hackman's testimony reveals that he was very

knowledgeable of Loyd's mental state and his adverse family environment. Hackman testified:

> The only, only thing I learned from him or his family was that he had been physically abused as a child by being beaten with either hand, or fist, or object of one kind or another severely by his father. Second, I learned that his father had threatened him with a weapon that he, Scotty believed was loaded. Threatened him with death on a number of occasions. I knew that, I don't know if this relates to psychological incidents. Scott abused alcohol. That his father was a very serious abuser of alcohol and perhaps other controlled substances. Hackman, pp. 132-33.

Finally, on direct examination, Hackman was asked if he felt that his representation of Loyd was effective. He replied as follows:

> There is not a case that I have ever handled no matter how well it turned out in a civil side and, or how poorly it turned out that I have not second guessed my efforts. And that is true of Scotty's case as well. You always wonder if you hit big well, could I have gotten more. And if you get middling verdict, or judgment, or dollars could I have gotten more. If you get a zip, well, what did you do wrong. And the same thing is true with Scotty's case. It's a courteously of being a trial lawyer. Maybe it's a blessing as well, but I don't see much blessing in that . So, I, looking back on it, I wished that since I was taking the financial beating I was as I have already explained to you, what's another few thousand dollars. I should have gone ahead and hired an investigator if the State was not going to pay for it. We should have

> gone ahead and found a psychiatrist that was a specialist in the kinds of forensic matters and that's what we should have done differently in my mind." Hackman, pp. 135-36.

The court accepts as true that Hackman was not pleased at being appointed to represent Loyd, and that Hackman continued in his desire to withdraw from the representation. Nevertheless, upon reviewing the entirety of Hackman's testimony, the court finds that Hackman's testimony did not evidence that he felt any hostility towards Loyd personally, nor does Hackman's testimony indicate that he had a negative attitude to his legal representation of Loyd. This court finds, even if Hackman was unhappy about being appointed to represent Loyd, he nevertheless was professional enough in his representation such that his adverse personal feelings about the case did not color negatively his personal representation of Mr. Loyd.[16]

The state court found in finding number four (*supra* p. 19), that Hackman considered the need for psychiatric testimony at the 1985 Sentencing Trial, but that he did not pursue it since he believed the insanity defense would fail.[17] This particular state court's finding is not fairly supported by the record and this court declines to accept this

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[16] The court notes that Hackman repeatedly referred to Loyd as "Scotty" in his testimony. *See e.g.* Hackman, p. 115.

[17] This finding is unusual since Loyd's insanity defense was unsuccessfully used at, and is only relevant to, the guilt/innocence phase. When Hackman was asked whether he knew the difference between the McNaughten Rule and mitigating circumstances at the Evidentiary Hearing, he answered that he was unsure of whether he knew the difference, and that he thought the testimony of Loyd's mother and sister would have been adequate for mitigating circumstances. Hackman, p. 124. Significantly, Hackman did not testify in reply to the question that he considered raising the insanity defense at the 1985 Sentencing Trial.

unsupported factual finding. Hackman testified that he was *unsure whether he knew the difference* between the McNaughten Rule and article 905.5 on mitigation. Hackman, p. 124. Furthermore, he stated that he "thought the testimony of his mother on mitigation and his sister on mitigation would be adequate." Hackman, p. 124. This testimony indicates that even if Hackman was not completely conversant with the detailed provisions of article 905.5, he clearly understood that mitigating evidence would benefit his client at the 1985 Sentencing Trial. Moreover, Hackman's testimony, as well as the testimony of Allison and Lewis (as discussed next), unequivocally establishes that Allison, *and not Hackman*, was in charge of trial strategy at the 1985 Sentencing Trial. As such, there is simply no evidence to indicate that Hackman was vested with the strategic decision of whether or not to pursue additional psychiatric testimony. Additionally, the record establishes that that Drs. Cox, Ritter, and St. Martin were in fact called by the defense to testify as to mitigating circumstances at the second sentencing trial. *See* discussion, *infra*, pp. 23-29.

The state court also found in finding number five (*supra*, p. 19), that Hackman did not realize that the mitigating factors of "mental or emotional disturbance" or "mental disease or defect" would be admissible at the sentencing trial since Hackman did not understand the difference between "the McNaughten Rule and mitigating factors of mental disease or defect." State Court Opinion, p. 5. Judge Caire also wrote, as set forth in finding number seven (*supra*, p. 20), that he found no reason to doubt the veracity of this aspect of Hackman's testimony. *Id.* This court notes, as set forth immediately above, that Hackman did not testify that he was unaware that evidence of these particular mitigating circumstances would be admissible at trial. This court concludes, however, that the state court's

findings amount to an inference which has support in the record. As such, the court defers and accepts this particular state court finding.

3. *Testimony of Randy Lewis*

Mr. Lewis was the third attorney on Loyd's defense team at the 1985 Sentencing Trial. He was originally appointed by Judge Bradley to defend Loyd (Lewis, p.184), and Hackman was the lead counsel before the 1985 Sentencing Trial. Lewis, p. 184. Lewis stated that he practiced law with Hackman, and that "[t]he majority of the work was civil but we did do probably twenty-five percent criminal to one third maybe at different times. Depending if you include the indigent defender work." Lewis, p. 185. The court notes the apparent inconsistency between Lewis' and Hackman's testimony regarding how much criminal experience the two attorneys had. The court is of the opinion that a practice which is twenty-five percent to one third criminal indicates that both lawyers had an objectively reasonable level of criminal law experience.

When asked whether he knew the difference between the McNaughton Rule and mitigating circumstances under article 905.5, he testified: " I was familiar with the McNaughten Rule. ... I **was also familiar with the mitigating requirements under the death penalty, *you know, having read them.***" Lewis, pp. 189-90 (emphasis added; *see also,* fn. 12, *supra*). Lewis also testified, consistently with Hackman and Allison, that Allison was the lead counsel when he took on the representation of the Loyd case for the 1985 Sentencing Trial.

> Q. As betweeen the three of you, Mr. Allison, and Mr. Hackman which one of you was lead counsel at the second trial?

A. You know, it was my understanding Mr. Allison was.

Q. How did you perceive your role?

A. I was -- I felt like my role was minimal. All I was suppose to do was more or less be their "go for", you know. If this needed something, or if they needed research, or it they needed me to go interview somebody, you know. And I was going to help Mr. Allison pick the jury so Gordon would not have to close his office down for those days.

Q. Did your -- is that in fact what you were?

A. That is in fact what I was, yes.

Q. Who among the three of you handled the voir dire of the second trial?

A. Both Mr. Allison and myself. We both asked questions.

Q. Was Mr. Hackman there at all?

A. No, you know, he might have walked in but he as a general principle, no, he was not there. Lewis, pp.192-93 (emphasis added).

On cross-examination, the State asked Lewis how much he knew about Loyd's "childhood abuses which he encountered?" Lewis, p. 218. Lewis responded as follows:

Gordon and I both suspected that, you know, in other words, we knew that from statistics that people who abuse children are generally as a child have been abused children themselves. So, you know, it was natural for us to make inquireies as

> to whether or not he had been an abused child. And we did. We did not find anything from any of his relatives or him that indicated that he was a sexually abused child. We did find out that he was an abused child such as, in other words his father was an alcoholic. His father beat him. His father would bring him to bars with him and leave him in the car and sometimes give him liquor as a child. We found those things out. *And those things were argued to the jury as mitigating circumstances.* We did not find any facts from any of the relatives or from Scott himself that indicated that he had been sexually abused as a child which I believed that was my belief. Okay. I believed all along that he, you know, that he must have been sexually abused or something in order to commit that kind of crime. But there was no, nothing that Gordon and I could find from his relatives or his Mama or him, even himself to indicate that. Lewis, pp. 219-220 (emphasis added).

The court finds that this testimony indicates that Lewis and Hackman undertook, an investigation into Loyd's family history and Loyd's history of abuse. Also, the testimony clearly establishes that both Lewis and Hackman were aware that mitigating factors were relevant to Loyd's case, and that mitigating evidence was indeed presented and argued to the jury.

After reviewing the testimony of Allison, Hackman, and Lewis, this court finds that the record clearly establishes that Allison was the lead counsel at the 1985 Setencing Trial. All three attorneys testified that Allison was the lead counsel. *See* testimony of Allison, pp. 39-40; Hackman, p. 116-18; Lewis, p. 192. As lead counsel, Allison was responsible for making most of the strategic and tactical choices in the trial. *See* Lewis, pp. 192-93.

This court has previously stated that it defers to and accepts the state court's finding that Hackman was ignorant of the article 905.5 mitigating circumstances. Loyd characterizes this state court factual finding that Hackman was ignorant as an implicit finding that the failure to procure additional psychiatric testimony stemmed, at least in part, from Hackman's ignorance as to the admissibility of statutory mitigating evidence of mental disease or defect.

This court believes that the state court did not make this implicit finding, and, if indeed the state court made such an implicit finding, that finding is not supported by the record and should be set aside by this court since there is no evidence to support this inference. *See Smith v. Black*, 904 F. 2d 950 (5th Cir. 1990). The record demonstrates clearly that Allison was in charge of Loyd's defense at the 1985 Sentencing Trial. As such, Hackman's ignorance of certain aspects of the law is completely superflous as to whether Allison, as lead counsel who was in charge of trail strategy, should have sought out another psychiatrist.

There is absolutely no evidence that Allison was ignorant of the statutory mitigating circumstances under article 905.5. Allison formed the defense strategy, and Allison was responsible for the strategic decision of calling Drs. Cox, Ritter, and St. Martin to present statutory mitigating psychiatric evidence to the jury. Additionally, Lewis stated that he was aware of the article 905.5 statutory mitigating circumstances. This court holds, therefore, that in the complete absence of the slighest scintilla of evidence that Allison was ignorant of the statutory mitigating circumstances, or in the complete absence of evidence that Hackman's ignorance impacted upon Allison's decision not to seek out another psychiatrist but instead to call Drs. Cox, Ritter, and St. Martin to present statutory mitigating evidence, there is absolutely no sup-

port for the inference that the failure to pursue further psychiatric testimony resulted, at least in part, from Hackman's ignorance of the article 905.5 statutory mitigating circumstances.

Moreover, this court finds that the testimony reveals that both Hackman and Lewis were aware of Loyd's distressing family history, Loyd's psychological condition at the time of the crime, as well as some of the extrinsic factors that impacted upon Loyd's criminal conduct, as set forth in the Feliciana Report. The record also shows that Loyd's counsel presented mitigating evidence, both psychiatric, as well as based upon Loyd's family history, to the jury. Finally, the court finds that Hackman and Lewis did undertake a reasonable investigation (prior to Allison's assumption of the role as lead counsel) into Loyd's tragic family history, as well as the circumstances surrounding the crime. *See* Lewis' testimony, pp. 219-20.

One of the troubling aspects in evaluating this ineffectiveness claim is that both Allison and Hackman testified that they did not feel competent in their representation of Loyd. Since both lawyers claimed that their representation was inadequate, and that, in hindsight, they should have hired an investigator and another psychiatrist, a reviewing court may find it difficult to hold that the decisions made by counsel were reasonable strategic and tactical choices when both lawyers claimed that their strategic choices were inadequate.

The State Court Opinion, as discussed above, expressly questioned the sincerity of Allison's claims of incompetence, finding that Allison's personal abhorrence of the death penalty affected his later assessment of his performance at trial. *See* State Court Opinion, p. 5. As previously discussed, this court concurs with the state

court determination and this court finds that Allison's testimony was inconsistent and contained a bias because of a desired result.[18] This court finds, additionally, that both Allison and Hackman were objectively qualified to handle a capital criminal case, notwithstanding their assertions to the contrary.

Moreover, the court finds that the testimony of Judge Bradley supports this court's finding that Hackman was an effective advocate for Mr. Loyd. Judge Bradley was the presiding judge over Loyd's prosecution until the Judge retired in 1984. Judge Bradley, pp. 740-41. As such, Judge Bradley did not preside over the 1985 Sentencing Trial. While his testimony is therefore not specifically relevant to Loyd's ineffectiveness claim at the 1985 trial, the Judge's testimony is nevertheless illustrative of Hackman's general skill as a trial lawyer. The Judge testified: "Mr. Hackman was very diligent [sic] in a pretrial. He explored to my mind, completely. And he, I know he took at least one writ on me. Possibly two of my handling of the preliminary matters." Testimony of Judge Bradley at the Evidentiary Hearing, p. 743. The Judge also stated that "Mr. Hackman never advised me he felt incompetent to proceed. Mr. Hackman advised me that it was distasteful. ..." Judge Bradley, p. 743-44. The Judge summed up his impression of Hackman's advocacy as "well qualified. He was an excellent trial lawyer. He seemed to have a grasp of the whole situation and the subject. His examination and cross-examination were excellent. What Mr. Hackman presented in court I could find no fault." Judge Bradley, p. 745.

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[18] This court's conclusion that Allison's personal opinions regarding the death penalty colors his testimony is not intended to denigrate Mr. Allison's sincerely held moral conviction regarding the death penalty. This court only believes that his personal convictions gave him an incentive to exaggerate his alleged ineffectiveness.

This court has carefully considered all of the testimony in evaluating Loyd's claim of ineffectiveness. The court concludes that the subjective impression of counsel in regards to their own performance is simply not relevant in making the objective legal determination of whether Loyd's counsel was constitutionally adequate. The *Strickland* court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 2064. This is an objective test, not a subjective one. The Court specified that the inquiry of the reviewing court "must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 2065. An attorney's perceptions regarding his own performance are both inherently unreliable and irrelevant in making the objective determination of whether his performance was constitutionally adequate.[19]

The State District Court found as the most compelling fact that "in the performance of counsel in this matter is that they simply failed to develop independent psychiatric evidence of mental disease or defect in a death case where this line of investigation was clearly indicated." State Court Opinion, p. 5, finding number eight, *supra*, p. 20. While the state court's conclusions in this regard has support in the record, this court feels that it suffers from the "distorting effects of hindsight...." *Strickland*, 104 S. Ct. at 2065.

The State Court finding in this regard ignores that Hackman did retain a psychiatrist, Dr. Scrignar, prior to

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[19] The danger of a subconscious bias in an attorney's self-assessment of his performance is particular relevant in death penalty are issues that have consistently polarized the public and members of the bar.

the guilt/innocence phase of the trial. Scrignar, in addition to Drs. St. Martin, Cox, Ritter, and psychologists Fain and Allen, found Loyd sane at the time of the commission of the crime. None of these examiners opined that Loyd had a mental disease or defect which impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. La. Code Crim. Pr. art. 905.5 (West 1984). Indeed, none of these examiners indicated that Loyd had any mental disease or defect. However, all of the examiners found that there were substantial mitigating circumstances to help explain Loyd's behavior. Moreover, the record establishes that this mitigating evidence was presented to the jury on Loyd's behalf at the 1985 Sentencing Trial (for instance, Loyd's alleged intoxication, abusive family environment, history of drug use, etc.). Given these factors, the court finds that there is no rational basis on which to hold that Loyd's attorneys, when faced with the fundamentally consistent opinions of three medical doctors and two psychologists, would have had any basis to consider that they should have sought out yet another psychiatric opinion to testify that a mental defect impaired Loyd's ability to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law.

Moreover, it is well-settled that Loyd was not entitled to another psychiatrist who would testify favorable to him, especially when Loyd had two psychiatrists and a medical doctor who did testify favorably to him at the 1985 trial. *Martin v. Wainwright,* 770 F. 2d 918, 934 (11th Cir. 2985), *cert. denied,* 479 U.S. 909 (1986). The Supreme Court in *Ake* cautions us that "[p]sychiatry is not ... an exact science, and psychiatrists disagree widely and frequently in what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms,

[and] on cure and treatment ... ." 105 S. Ct. at 1095.[20] Clearly, counsel did not have an affirmative duty to find a psychiatrist who would say that Loyd was insane or had a mental defect that impaired Loyd's capacity to conform his conduct to the requirements of law. *See Roach v. Martin* 757 F. 2d 1463, 1477 (4th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985). Finally, this court notes that there was absolutely no indication on the record, nor did Loyd's new attorneys present any argument whatsoever, to indicate that Allison, Hackman, or Lewis should have doubted the thoroughness or the accuracy of Drs. Scrignar's, Cox's, St. Martin's, Ritter's, Fain's, and Allen's fundamentally consistent diagnoses of Loyd's mental condition.

In conclusion, this court finds that Loyd's attorneys had no basis for assuming that they could have found a psychiatrist somewhere in the country who would testify that Loyd may have a mental disease or defect which impaired the petitioner's ability to appreciate the criminality of his conduct or to conform his conduct to the re-

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[20] The *Ake* court also held:

> The State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense [or preparation at the sentencing phase]. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. *Ake*, 105 S. Ct. at 1096.

Since Loyd was examined by psychiatrists Scrignar, Ritter, and Cox, as well as by Dr. St. Martin, and by psychologists Fain and Allen, and since Drs. St. Martin, Ritter, and Cox testified on Loyd's behalf at the 1985 trial, this court disagrees that counsel were ineffective for not finding yet another psychiatrist who would have testified that Loyd had an organic brain defect particularly when counsel could reasonably rely on the expert opinions of the previous six examiners who did not find any evidence of mental defect which was in any way causally related to the crime.

quirements of law.[21] Additionally, as will be shown in detail later in this Opinion (*see infra*, pp 66-79), the court finds that Loyd's new experts (Drs. Honor, Scanlon, or Sanchez) did not testify that Loyd's possible frontal lobe impairment had a causal nexus to Loyd's criminal actions. That is, none of Loyd's new experts testified that Loyd had a mental disease or defect which impaired his ability to appreciate the criminality of his conduct or impaired his capacity to conform his conduct to the requirements of law. As such, this court holds that the State court's conclusion that counsel had a duty to develop testimony that Loyd had a mental disease or defect, unless viewed in hindsight, is not supported by the evidence.[22]

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[21] The evidence of Loyd's possible brain defect will be discussed in detail further in the body of this opinion.

[22] This court is aware that Allison testified that there was some gaps in the record which needed to be explained and that Allison indeed made a half-hearted attempt to procure another psychiatrist. As discussed earlier, the court questions the accuracy of Allison's assessment in regard to his own performance.

This court finds that calling Drs. Cox, Ritter, and St. Martin to present statutory mitigating evidence to the jury at the 1985 Sentencing Trial was more than reasonable and constitutionally adequate under the circumstances prevailing at the time of the trial. *Strickland*, 104 S. Ct. at 2065.

By the time of the 1985 Sentencing Trial, an extensive psychiatric record existed in regard to Loyd. Loyd's attorneys used this record and the testimony of Drs. Cox, Ritter, and St. Martin advantageously at the trial. The testimony of Dr. Honor was procured almost seven years after the offense, and it is unsound to label counsel's performance ineffective just because a new team of attorneys were able to procure a psychiatrist seven years after the fact who would also have testified favorably to the defendant.

The test under *Strickland* is to evaluate counsel's performance at the time it occurred and under the circumstances under which it occurred. A court should not find ineffectiveness due to the post-hoc production of new evidence procured seven years after the fact, especially when there was no rational way for counsel to have assumed that they either needed more testimony or could find more favorable expert testimony that they already had. The conclusion of ineffectiveness is even more

Furthermore, as pointed out earlier in this opinion, the testimony of Dr. Cox, Ritter, and St. Martin at the 1985 trial more than satisfied Loyd's due process right to psychiatrist assistance at trial. *See Ake v. Oklahoma*, 470 U. S. 68, 105 S. Ct. 1087 (1985). The *Ake* court held that: (1) when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at the guilt/innocence trial, due process requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one; and (2) when the State plans to introduce psychiatric evidence on the defendant's future dangerousness, an indigent defendant has a due process right to a psychiatric examination on relevant issues, to the testimony of a psychiatrist, and to assistance in preparation at the sentencing phase.

Ake might also entitle a defendant to a psychiatrist's aid in presenting mitigating circumstances. *Dufour v. Mississippi*, 479 U.S. 891, 107 S. Ct. 292, 294-95 (1986) (Marshall, J., dissenting); *Thompson v. Wainwright*, 787 F. 2d 1447, 1459 (11th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987), *stay denied, reh'r denied*, 483 U.S. 1012 (1987). In this case defendant did retain a psychiatrist, Dr. Scrignar, prior to the guilt/innocence phase of the trial. Loyd also had the benefit of statutory mitigating psychiatric testimony at his 1985 Sentencing Trial; namely, the testimony of Drs. Cox, St. Martin and Ritter. The State, on the other hand, presented absolutely no psychiatric testimony to rebut the evidence put on by attorney Allison on behalf of Loyd.

Additionally, the state court granted Allison's Mo-

(footnote 22 continued)

curious when the record demonstrates that the testimony of Loyd's new expert, Dr. Honor, is largely cumulative to Dr. Cox's testimony at the 1985 trial. *See* discussion, *infra*, p. 84.

tion for funds for a new psychiatrist. While Loyd now contends that the State's grant of only $600.00 was inadequate, Petitioner's counsel at the time that the Motion for the funds was granted made no showing to the court that additional money was needed.[23]

Finally, this court finds that Allison and Hackman were aware of Loyd's tragic family history and psychological condition. *See* Testimony of Lewis, pp. 218-20. Hackman and Lewis investigated whether Loyd had been a victim of child abuse (*id.*), and this reasonable investigation did not uncover any additional evidence.

This court concludes, therefore, that as a matter of law, and after giving deference to the state court finding of fact which are supported by the record, that Loyd had effective assistance of counsel at the 1985 Sentencing Trial. To hold otherwise is to ignore the warning of *Strickland* that an evaluation of counsel's adequacy must be based upon the circumstances as they existed at the time of the trial, and that a reviewing court must be careful to avoid the distorting effects of hindsight. *Strickland*, 104 S. Ct. at 2065. *Strickland* does not mandate the best possible defense; nor does it mandate a better defense. Instead, the Supreme Court has stated that counsel's performance is constitutionally adequate if it is objectively "reasonable considering all the circumstances." 104 S. Ct. at 2065.

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[23] *See* this court's Opinion and Order, dated 27 July, 1989, page 54, for a fuller discussion of Loyd's due process rights under *Ake*. As for Loyd's argument that Allison was constitutionally ineffective since he did not complain to the state court that $600 was insufficient to retain a new psychiatrist, this court reiterates that there has been no showing that Allison should have found that the extensive psychiatric record which he had before the trial was insufficient for the purposes of Loyd's defense.

PREJUDICE

Although this court holds that as a matter of law that Loyd had effective represention of counsel, this court will also fully consider the prejudice prong of the *Strickland* analysis.

The second prong of the *Strickland* analysis is whether counsel's deficient performance prejudiced the defendant. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 104 S. Ct. at 2964. The defendant must "affirmatively prove prejudice." *Id.* at 2967. In doing so, it "is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* Instead, the "defendant must show that here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 2068.

STATE COURT OPINION

The State District Court found that Petitioner did not affirmatively prove prejudice. The court found that the testimony of Loyd's experts, taken alone, "would appear to raise serious questions as to petitioner's mental competence. However, petitioner's experts based their opinions on a number of hypothetical facts which in this court's opinion were never established." State Court Opinion, p. 9. These unproven facts, some of which were taken from the Feliciana Report, included the following: that Loyd had been drugged at the bar, that Loyd worked unusually long hours in excessive heat, and that Loyd suffered a concussion during a boat ride on the afternoon before the crime.

The court also noted that while Loyd's experts observed some signs of frontal lobe brain impairment, "no more than a suspicion was indicated, even by his own experts, that this irregularity explained or excused the crime." Opinion, p. 10. The court concluded that the "enormity of the crime committed was so great that any mental disease or defect, short of legal insanity, would simply not, in this court's opinion, have tipped the balance in any jurors mind so as not to warrant a sentence of death." Opinion, p. 11.

As mandated by §2254(d), this court defers and accepts the findings of facts as stated by the State District Court to the extent that these findings are supported by the record. §2254(d) (8); *Sumner v. Mata*, 449 U.S. 539, 101 S. Ct. 764, 770-71 (1981). Moreover, this court concurs in the State District Court's conclusion that Loyd has not affirmatively proven prejudice. In arriving at this legal conclusion, this court has examined the record in detail and will make its own supplemental factual finding as to the prejudice prong.

When Loyd was originally arrested, his mother requested that Loyd be examined by a doctor. *See* Transcript of Motion to Suppress, March 26, 1982, Vol. III of X, pp. 30-31. The Sheriff subsequently arranged for Loyd to be examined by Dr. S. J. St. Martin. *See* Testimony of Dr. St. Martin at Evindentiary Hearing, March 17, 1988, "St. Martin," p. 4. St. Martin was the coroner for St. John the Baptist Parish and he had a family practice in which he had treated the Loyd family for several years. St. Martin knew that Loyd came from a physically battered family and that Loyd's father was an alcoholic. St. Martin, p. 10.

St. Martin examined Loyd and concluded that Loyd was very cooperative, very remorseful and very

knowledgeable of the charges against him. St. Martin, p. 4. Loyd did not claim to be hallucinating, he could recollect well and his memeory was not impaired. St. Martin, p. 5. Although the doctor did not know what caused Loyd to commit the crime, he opined that Loyd was not undergoing a psychotic episode at the time of the crime. St. Martin, p. 21. The doctor, however, did not know whether the crime was sexually motivated. St. Martin, p. 34. Loyd stated that he had been drinking beer immediately prior to the crime, but he denied that he was taking drugs. St. Martin, p. 38.

St. Martin found that Loyd had become severely depressed and anxious. Accordingly, St. Martin prescribed Mellaril, a phenothiazine which has an antidepressant factor. While Mellaril is used for treatment of psychosis, it it also used to treat depression associated with anxiety. St. Martin, pp. 26-27. Loyd was still on Mellaril when the Sanity Commission findings were made. Dr. St. Martin testified that the Mellaril did not mask anything other then depression and anxiety because the Mellaril was never given in doses high enough to mask psychosis. St. Martin, p. 42.[24] Dr. Ritter testified consistently with St. Martin, that

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[24] Loyd vigorously contends that since Mellaril is used to treat psychosis, Dr. St. Martin must have believed that Loyd was psychotic at the time he administered the drug. This logic is flawed since St. Martin explicitly testified that he prescribed the drug for Loyd's depression and anxiety, and that Loyd was not psychotic at the time St. Martin examined him or prescribed the drug. St. Martin, pp. 21, 26-27.

Thus, while this court accepts that Mellaril is used primarily for psychosis, Loyd had produced absolutely no evidence to support its inference that St. Martin, the prescribing physician, or anyone else, thought that Loyd was psychotic at the time the drug was prescribed. Instead, St. Martin testified unequivocally that Loyd was not psychotic, and that the small amount of Mellaril used did not mask any signs of psychosis in Loyd since the amount used was far too minimal to accomplish that. St. Martin, p. 42; *see also,* Testimony of Dr. Ritter at Evidentiary Hearing, February 4, 1988, p. 62.

Accordingly, since there is absolutely no evidence to indicate that St.

"phenothiazine" may be prescribed with an antidepressant to control the agitated part of depression. *See* Testimony of Dr. Ritter at Evidentiary hearing, February 4, 1988 "Ritter", p. 62.

Three weeks after the crime, the court appointed Dr. St. Martin and Dr. Kenneth Ritter, a Board Certified Psychiatrist since 1955 and a specialist in Forensic Psychiatry since 1981, to a Sanity Commission. The purpose of the Sanity Commission was to determine: (1) whether, under the McNaughten Rule, Loyd was sane or insane at the time he committed the offense[25]; and (2) whether Loyd was competent to stand trial. These doctors determined that Loyd was able to appreciate the usual, natural and probable consequences of his acts, that he was able to distinguish between right and wrong at the time of the offense and afterwards, and that Loyd was sane at the time of the offense.

Dr. Ritter testified that he based this conclusion on his own examination of Loyd, consultation with Dr. St. Martin who had examined Loyd shortly after his arrest, consultation with the sheriff and deputy who arrested

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(footnote 24 continued)

Martin thought that Loyd was psychotic, and since Loyd's evidence that Mellaril is used for treatment of psychosis does not, by itself, establish that the small doses of Mellaril given to Loyd would mask symptoms of psychosis, this court finds that the use of Mellaril does not indicate that Loyd was psychotic, and that the use of Mellaril on Loyd in this instance did not mask any symptoms of psychosis.

[25] The McNaughten Rule, codified in La. Rev. Stat. Ann. § 14:14 (West 1986), states:

> If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility.

Loyd, arrest reports and reports from Loyd's mother. Ritter, p. 34. Dr. Ritter admitted that Loyd was depressed but that "there was certainly no signs of any psychosis at all" (Ritter,p. 38), Loyd was not in a state of delirium (Ritter, p. 41, and Loyd was not schizophrenic (Ritter, p. 61) (emphasis added).

While the doctors determined that Loyd was sane at the time of the offense, the doctors opined that Loyd's depression rendered him unable to understand the charges and proceedings against him and that he could not effectively participate nor assist in his defense. *See* Report from Dr. Ritter and Dr. St. Martin, Record, Vol. I of X, p. 32, and Transcript of Sanity Hearing, p. 6, Record, Vol. I of X, p. 34. Since Loyd was found to be unable to face the charges against him, the court committed Loyd to the Feliciana Forensic Facility ("Feliciana") on June 11, 1981, for treatment of his depression. *See* Court's Order, Record, Vol. I of X, p. 33.

Loyd was institutionalized at Feliciana for approximately four months. During this time, Dr. Aris Cox, a Board Certified Forensic Psychiatrist, treated Loyd and later presented mitigating psychiatric evidence to the jury on Loyd's behalf at the 1985 Sentencing Trail.[26] At the time of Loyd's institutionalization, Dr. Cox was the only psychiatrist in Louisiana who was board-certified in forensic psychiatry. *See* Testimony of Dr. Cox at Sentencing Transcript, Vol. 5 of 6, p. 214.

Dr. Cox testified that at Feliciana Loyd's primary diagnosis was depression with no evidence of psychotic symptoms. *See* Testimony of Dr. Cox at Evidentiary Hear-

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[26] For a discussion of the mitigating psychiatric testimony presented on Loyd's behalf at the 1985 trial, see *infra*, pp. 23-29.

ing Cox was asked if it was possible for Loyd to have had a temporary psychosis when the crime was committed. Cox responded, "It's possible. In my opinion the probability was not great, it was small." Cox, p. 102 (emphasis added). Cox further stated that: "There was a diagnosis listed on the chart ... of antisocial personality disorder, that is error, and I do not concur with that diagnosis. I think he was primarily depressed, had a history of substance abuse." Cox, p. 95.

Loyd was also examined at Feliciana by Dr. Thomas Fain, a Board Certified Psychologist, and R. Roy Allen, M.A., a Psychological Assistant III. In their psychological evaluation of Loyd, the following tests were performed: Quick Test; Minnesota Multiphasic Personality Inventory ("MMPI"); Wechsler Adult Intelligence Scale — Revised; Purdue Pegboard; Finger Tapping Test; Bender Gestalt Visual Motor Test; Wechsler Memory Scale; Rorschach Psychodiagnostic; Thematic Apperception Test; House-Tree-Person Technique; and Clinical Interview. *See* Psychological Evaluation Report, Record, Vol. I of X,, pp. 36-39.

The Feliciana Report of Loyd's psychological evaluation points out the following: Loyd has no previous arrest record; Loyd was physically abused as a child; in the Navy, Loyd was treated for mental problems, he used alcohol, marijuana and PCP, and he suffered with migraine headaches and suffered adverse effects of noise and vibration while working on a ship; as a foreman in a sugar refinery shortly before his arrest, Loyd worked long hours under stressful conditions and he was exposed to heat; Loyd reported his excessive beer drinking and suspected drug ingestion on the day of the crime; Loyd reported that

he hit his head during a boat ride on the day of the crime[27]; Loyd suffered loss of memory following the crime; Loyd cooperated and adjusted to life at Feliciana; at Feliciana, Loyd experienced headaches and difficulty in sleeping and was given Dalmane and Tylenol. The Feliciana Report also states:

> [Loyd] seems genuinely remorseful. It was hard to tell how complete or genuine his amnesia was, although he gave the impression that he remembers some details of the crime.
>
> He was well-oriented and apparently not suffering from delusions. At one point, he implied that he was hearing voices, but *later*, he denied it.
>
> Mr. Loyd's overall intellectual functioning is currently in the average range. ... On a special test of memory, Mr. Loyd *showed no impairment in either short or long-term memory.*
>
> Testing for organic brain damage was not extensive. Some evidence of problems coordinating movement in his left hand was revealed, thus lending support to his complaints of weakness in that area. It is not possible to say when that damage might have been sustained. Other than that, *no evidence of brain damage was found.*

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[27] The State District Court found that many of these facts were not proven at the trial. While parts of the Feliciana Report were read into evidence at the 1985 Sentencing Trial, the court notes that these facts were neither demonstrated at trial nor at the Evidentiary Hearing.

Loyd seems to argue that counsel's failure to prove these facts at trial arises to the level of ineffectiveness since they should have hired an investigator. This court declines to accept that counsel is ineffective by failing to investigate, more thoroughly than they already did, a set of uncorroborated allegations made by a defendant.

Mr. Loyd is apparently not psychotic ... .

On a scale of unusual sexual interests, he scored in a way that is similar to men who have had sexual involvement with children. This profile is not one of aggression or dangerousness, but rather one that includes some dissatisfaction with normal heterosexual relations and a strong preoccupation with moral and religious issues. Other evidence also points to a basically immature sexual adjustment and some fear of mature women ... .

Mr. Loyd may have sustained minor brain damage. *This appears to be unrelated to either the commission of the crime or his memory loss.*[28] The amnesia seems to be hysterical in nature, that is, it is a psychological defense which protects him from directly confronting the fact that he has performed actions that are strongly unacceptable to him.

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[28] Loyd's new expert, Dr. Honor, whose testimony will discussed *infra*, testified that Loyd has the possibility of organic brain dysfunction. Since Honor is of this opinion, Loyd has tried to characterize the testimony and findings of the three prior physicians (Cox, Ritter, and St. Martin), as well as the findings of the two psychologists (Fain and Allen) as inadequate since, as Loyd contends, none of these five experts considered the possibility of organic brain dysfunction.

As the text of the Feliciana Report explicitly states, the Report found that there may have been some minor brain damage, but that this damage "appears to be unrelated to either the commission of the crime of [Loyd's] memory loss." Additionally, Dr. Cox, as will be discussed *infra* also pointed out that Loyd may have suffered from some minor brain damage.

Since the Report did consider whether Loyd had brain damage and whether this brain damage had any causal nexus to Loyd's commission of the crime, the court finds that any assertion that the possibility of brain damage was not considered by the Feliciana staff or by Dr. Cox is completely devoid of any support in the record.

> The evidence suggests that at the time of the crime, Mr. Loyd was capable of recognizing the rightness or wrongness of his actions. In order for him to have committed the crime, he would have to have been experiencing a strong compulsion to commit a sexually violent act at the same time that there was a reduction in his social judgment and inhibitions. Alcohol intoxication could have been a critical factor, although the possibility that he was drugged cannot be ruled out on the basis of the psychological data. Feliciana Report (emphasis added).

On October 26, 1981, Dr. Cox reported that Loyd was competent to stand trial and that he could assist his attorney in his own defense. *See* Dr. Cox's letter, record, Vol. I of X, p. 35. In November 1981, Drs. Ritter and St. Martin also found that Loyd's depression had subsided and that Loyd could participate in his own defense. Ritter, pp. 32-33.

EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING[29]

As stated earlier, Loyd argues that he has proven prejudice by demonstrating that there is significant new evidence that Loyd suffers from an organic frontal lobe brain dysfunction that should have been discovered by his prior counsel and by Dr. St. Martin, the three psychiatrists (Scrignar, Ritter, and Cox), and two psychologists who examined Loyd. Petitioner contends that this evidence is

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[29] Although this court has summarized much of the testimony of Drs. St. Martin, Cox, Ritter, as well as the testimony of psychologists Fain and Allen, in the immediately preceding pages, the court believes that it is necessary to repeat these findings in the context of presenting the testimony of the Evidentiary Hearing. The court feels that a complete analysis of the prejudice prong of *Strickland* requires a full, detailed description of all of the expert testimony.

statutory mitigating evidence of a "mental disease" or "mental defect" admissible under article 905.5. He further asserts that if this new evidence had been presented in conjunction with the significant statutory mitigating evidence presented on Loyd's behalf at the 1985 Sentencing Trial, there would have been "a reasonable probability" that "the result of the proceeding would have been different." *Strickland*, 104 S. Ct. at 2068.

This court finds that the evidence procured by Loyd's new experts almost seven years after the offense could indeed be characterized by the legal buzzwords of "mental disease" or "defect." The court finds, however, that this new evidence, when examined in detail, is not nearly as solid or as persuasive as Loyd's counsel contends that it is. The evidence is largely cumulative of the statutory mitigating evidence that was presented at trial, and Loyd's primary expert, Dr. Honor, did not testify that Loyd's possible frontal lobe impairment was in any way causally related to the crime. As such, this court finds that Dr. Honor did not present any evidence that Loyd's possible mental defect impaired his ability to appreciate the criminality of his conduct or impaired Loyd's ability to conform his conduct to the requirements of law.

1. *Testimony of Dr. Steven Honor at the Evidentiary Hearing*

Dr. Steven Honor, a clinical and neuro-psychologist from New York, examined Loyd in December 1987. He testified that in his neuro-psychological evaluation of Loyd, he relied on the following: (1) chronology of events written by Loyd's present attorney, John Getsinger; (2) background history provided by both Mr. Getsinger and Loyd's mother; (3) the forensic psychological examination by the Feliciana staff; (4) the raw data from the Feliciana

forensic psychological examination; (5) the medical records from Feliciana; (6) forensic reports by Dr. Manfred Meier and Dr. Kenneth Perkins; (7) Loyd's letters to Hackman; (8) Loyd's Naval records; (9) various court testimony.[30]

In administering the Wechsler Adult Intelligent Scale-Revised, Dr. Honor found that "[t]hat Mr. Loyd was not suffering from any intellectual impairment." Honor, p. 367. This court finds, therefore, that since none of the experts found that Loyd was intellectually impired, Loyd is not intellectually impaired. Honor also administered an MMPI (Fain also administered an MMPI, *see* Testimony of Fain at the Evidentiary Hearing, p. 136; *see also,* Testimony of Dr. Honor at the Evidentiary Hearing, p. 369), and Loyd took two hours and twenty-five minutes to complete the test, which is normally completed in one and one-half hours. Honor, p. 371-72. The test results were "remarkably similar" to the results by Fain's test, and Honor found that the similar results indicated "that the personality profile is a very consistent one." Honor, p. 372. Honor concluded from the MMPI, consistently with Fain, the following:

> The test [is] indicative of an extremely high level of emotional disturbance. I would have to put it even stronger. The results support the other data which indicates that this individual is of a borderline psychotic nature. Has very clearly paranoid ideology and schizophrenic personality characteristics. There are many depressive features in the protocol itself and that the world is viewed by this individual in a very emotionally upsetting way. The world is a very threatening place for this person. Honor, p. 373.

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[30] Dr. Honor's report, dated January 14, 1988, is attached to Loyd's Original Petition in this court as Appendix JJ.

Honor concluded that Loyd is not a pedophile, but *that he has an addictive personality. Honor, pp. 373-4.* The doctor also performed the Trail Making Test, the Wisconsin Card Sorting Test, and Sequencing and Coordinating Movements specifically for the purpose of determining whether Loyd had any organic brain dysfunction, "*since that had been raised in the original report.*" Honor, p. 374 (emphasis added). The court finds, therefore, based upon the explicit testimony of Dr. Honor, that he tested for organic brain dysfunction because the possibility of brain damage had been raised in the Feliciana Report.[31]

Honor's testing for brain damage focused on frontal lobe dysfunction, which effects the "executive functioning" of an individual. Honor, p. 375. "Executive functioning" is "the ability of an individual to function rationally, to think logically, and coherently." Honor, P. 375. The doctor concluded that Loyd's scores "would be consistent with a brain dysfunction." Honor, p. 376. Honor also opined that it would be very difficult for a person to "fake" his responses on the test, although it would not be impossible. Honor, p. 377-78.

In making his diagnosis, the psychiatrist also relied on information about Loyd's family history. Spoecifically, Honor emphasized that Loyd had been beaten as a child, Loyd's
claim that he was sexually abused as a child, Loyd's

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[31] Honor's own testimony belies the assertion that no testing had been performed on Loyd for organic brain damage or dysfunction. Since the possibility of brain damage had been investigated and discussed by the Feliciana Report and by Dr. Cox, and since both the Feliciana Report and Dr. Cox did not find any evidence that Loyd's possible minor brain damage was connected, in any way, to the crime, this court finds that it was reasonable for cousel not to pursue further testing in this area when counsel had extensive reports and psychiatric testimony to indicate that no further testing in the area of brain damage would be helpful or necessary.

Loyd's claim that he was sexually abused as a child, Loyd's *physical and sexual abuse of others*, Loyd's history of drug abuse, and the absence of any stable relationships, "specifically with women," in Loyd's life. Honor, pp. 387-95. Honor summarized his opinion of Loyd as follows:

> [Loyd is] is an individual with a strong sense of inadequacy in general functioning. and very clearly [has] a lack of psychological integrity which shows up on each of the tests. It also indicates that Mr. Loyd is capable of expressing, you know, positive feelings towards people. It's not all negative. He does have caring feelings for other individuals. But life is perceived as a very difficult process. And the ability of the individual to overcome the adversity in life is found to be quite problematic. The feeling basically being that when one meets adversity he really can't overcome it. Honor, pp. 396-97.

When asked what factors caused Loyd's criminal actions, Honor pointed to the following events in the several days before the crime: lack of sleep[32], "extremely high heat"[33], constant alcohol consumption[34], and depression on account of Loyd's failure to get a loan for a house. Honor, pp. 398-99. The doctor also considered the possibility of

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[32] This allegation was not proven at trial. As stated earlier, Loyd claims that the failure of counsel to prove this allegation shows that they were ineffective. The court has previously discussed this flaw in Loyd's position (*see infra*, fn. 27), and will not discuss it again at this stage in the Opinion.

[33] This fact was also not proven at trial.

[34] *See* this court's discussion of Loyd's claim of intoxication, *supra*, fn. 10.

whether Loyd had been drugged.[35] These factors combined with Loyd's "borderline psychotic" state to produce the crime. Honor, p. 399-400. Dr. Honor did not testify that Loyd's possible mental defect impaired Loyd's ability to appreciate the criminality of his conduct or that the possible brain dysfunction impaired Loyd's capacity to conform his conduct to the requirements of law.

Honor also points out that Loyd told him that he heard voices. Honor, p. 405. Loyd had originally mentioned hearing voices to the physicians at Feliciana, but later Loyd admitted that he was not telling the truth. *See* Feliciana Report, as set forth on p. 62 of this Opinion.

Honor was also asked whether he thought the rape was a sexual crime. He opined that it was not. "The rape became a weapon. It became a way of killing this child. If he had a gun that could have been a weapon." Honor, p. 408. The doctor also opined that Loyd was in a state of diminished capacity at the time of the crime. Honor, p. 410.[36] Honor further believes that Loyd is not a sociopath.

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[35] This fact was also not proven at trial. Loyd claimed that some one had dropped a drug in his drink while he was at a bar prior to his rape and murder of the three year old girl. There was no corroboration for this claim, and while this court cannot be certain whether hiring an investigator (as Loyd claims counsel should have done) would have indeed proven this fact, the court notes that Loyd's present argument in this regard confuses the concept of a "better" representation with the minimal standards of constitutional adequacy as set forth in *Strickland.*

[36] As discussed in this court's original Opinion and order dated July 27, 1989, on pages 35-36, Louisiana does not recognize the defense of diminished capacity as a defense against the guilt of any criminal conduct. *State v. Jones,* 359 So. 2d 95, 98 (La. 1978), *cert. denied,* 439 U.S. 1049 (1978). Additionally, this court notes that the concept of "diminished capacity" is not listed as a statutory mitigating factor under La. Code Crim. Pro. article 905.5. The court believes, however, that a diminished capacity may be relevant under 905.5(h), which is "[a]ny other relevant mitigating circumstance."

He based this conclusion on the opinion of the psychologist, Dr. Fain, who found that Loyd felt remorse for his actions. Honor, p. 413. Honor testified that Loyd had an intent to kill the child (Honor, p. 415), but Honor disagreed with Fain's findings that Loyd was capable of recognizing the difference between right and wrong at the precise time that he committed the crime. Honor, p. 434. He admitted, however, that "somewhere's in the back of his mind he knew the difference between right and wrong." Honor, p. 437.

Honor was specifically asked whether he thought Loyd was malingering. The doctor opined that he did not think Loyd was malingering, but that it is possible. Honor, pp. 443-45. Honor noted, however, that Dr. Fain disagreed with Honor's belief about malingering, and that Fain felt that Loyd was indeed malingering. Honor, p. 446.

Honor was also questioned about whether Loyd could have hidden the child's clothes, disposed of the mother's purse, as well hidden the victim's body, if Loyd were indeed having a psychotic episode at the time of the crime. Honor responded that "I would conclude that either in that [psychotic] state there was enough functioning integrity to recognize at that time what it is that he had done." Honor, p. 473. Honor reiterated that Loyd was not able to "appreciate the consequences and the significance of his actions and the requirement for him to conform his behavior to society standards ... [b]ecause I believe he was operating in the state of diminished capacity." Honor, p. 489. Honor also characterized Loyd as having a temporary psychosis at the time of the crime, but Honor admitted that it is possible for Loyd to have misled Honor into making a wrong diagnosis. Honor, p. 508. Finally, the doctor admitted this his conclusions were partly "speculative." Honor, p. 498.

2. *Testimony of Dr. Barry Francis Scanlan*

In evaluating Loyd, Dr. Scanlan, a psychiatrist, testified that he personally interviewed Loyd and that he had reviewed essentially the same data that Dr. Honor had reviewed.[37] Scanlan testified at the Evidentiary hearing that at the time Loyd committed the crime, Loyd had a limited capacity to make judgments. Scanlan, p. 585. To some degree Loyd knew what he was doing, but that the quality of his act was "delusional." Scanlan, p. 598-99, 612.[38]

In forming his diagnosis of Loyd, Scanlon relied on the following significant factors affecting Loyd's childhood: Loyd's father was an alcoholic and abusive, the physical abuse was "ongoing throughout" Loyd's life, Loyd was the victim of homosexual incestuous physical abuse by one of his paternal uncles, and Loyd had incestuous relationships with his siblings. Scanlon, p. 534-37. Scanlon also relied on the unproven allegations of what happened to Loyd in the 48 hours preceding the trial, and stated that those factors suggested that his "state of mind at that time was one of a delirium or what is non specifically referred to as an organic brain syndrome." Scanlon, p. 564; p. 630. The doctor defined delirium as follows: "A delirium per se is a global disruption of cognitive functioning of some greater or lesser degree." Scanlon, p. 637.

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[37] Dr. Scanlan's written summary, dated January 14, 1988, is attached to Loyd's original Petition in this court as Appendix LL.

[38] Dr. Scanlon testified as to his definition of delusion:

> A delusion is a fixed unshakable and false belief that somebody has about the world or about themselves that a normal person when shown evidence to the contrary would give up the belief. But a delusion cannot be shaken by evidence to the contrary. Scanlon, p. 628.

Scanlon testified that Loyd may have been psychotic, and Loyd may not have been able to make a judgment as to the difference between right and wrong. Scanlon, p. 566. The doctor admitted that it was possible that Loyd was malingering or faking a mental illness, but Scanlon found that it was doubtful that Loyd was malingering. Scanlon, p. 573-75. When asked again if Loyd knew the difference between right and wrong, Scanlon said:

> I think a convincing case can be made that Loyd was incapable of distinguishing between right and wrong in view of my conclusion that the quality of Loyd's acts were delusional (psychotic) or delirious, (impaired by physical factors). Again, to put it in less technical terms, Loyd may have had a rather limited awareness that he was drowning, raping, and sodomizing a little girl (the 'nature' of his acts) but it is unlikely in view of his delusional "psychotic" or delirious [state] ... that he could have understood the moral significance of his acts." Scanlon, p. 578.

On cross-examination, Scanlon admitted that Loyd had indeed made a moral decision as to the right or wrongness of his actions on that night, and that this determination occurred shortly after Loyd committed the crime. Scanlon, pp. 580-81.

Dr. Scanlon also testified in regards to Dr. Honor's theory of frontal lobe impairment. Scanlon stated: "There is some, Dr. Honor, the neuropsychologists in his testing and his reports I have seen indicated that there was some evidence of frontal lobe damage." Scanlon, p. 582. Notably, Scanlon was asked whether he did any testing to determine whether Loyd had any brain damage. Scanlon replied: "There was a [sic] electroencephalogram that was performed on Mr. Loyd sometimes in the last two weeks. Actually

it's about a week ago now. I guess that was interpreted as having some non-specific abnormalities to it that were not diagnostic of anything particular." Scanlon, p. 645. When asked again about the testing for brain damage, the doctor repeated, " I can say nothing more than the report said that it was a non-specific finding." Scanlon, p. 646. As such, this court finds that the objective testing done by Scanlon for organic brain damage did not demonstrate any particular brain damage or dysfunction.

Dr. Scanlon opined that Loyd may have been in a delirium at the time he committed the crime. He relied upon several unproven allegations in arriving at his diagnosis; namely, sleep deprivation, the possibility of Loyd having been involuntarily drugged, possible head injury immediately preceding the crime, and hyperthermia. Scanlon, p. 583. Scanlon also indicated that he had no new evidence of psychological or mental disease in regard to Loyd other than the information taken from all of the previous evaluations. Scanlon, p. 655.

This court finds that to the extent that Scanlon testified that Loyd may have been in a delirium at the time of the crime due to organic as well as the psychological factors (such as child abuse, personal disappointment, etc.), Scanlon's opinion was based upon several unproven factual allegations, as well as upon Dr. Honor's testing for frontal lobe brain dysfunction. Dr. Scanlon's own testing for brain damage, as discussed earlier, did not produce any definitive findings. The State District Court specifically found that the testimony of Loyd's new experts was based upon several unproven facts, and as this court has demonstrated, in the context of Drs. Honor's and Scanlon's testimony, that the state court conclusion is clearly supported in the record. Accordingly, this court defers and accepts this well-supported factual finding.

Even though Scanlon opined that Loyd may have been in a delirium at the time of the crime, Scanlon nevertheless testified that Loyd "had some limited capacity to make judgments..." at the time of the crime. Scanlon, p. 585. He also declared that Loyd's attempt to bury the body of the little girl with leaves required some conscious thought. Scanlon, p. 587..

Scanlon then discussed that psychiatry is an inexact science and that he "can't get inside of Scott Loyd's mind six years after the fact and see what he was doing and know what his motive was." Scanlon, p. 589. The doctor reiterated that Loyd was aware of his physical actions, but his capacity to judge the moral consequences was impaired because he was delusional. Scanlon, p. 598. Although Scanlon felt that Loyd may have had a diminished capacity at the time he committed the crime, the doctor acknowledged that Loyd beat Mr. Poche at a game of pool immediately prior to the crime[39], and that Loyd had the motor skill to "at least successfully drive a car in front of a police officer and get to where he's going." Scanlon, p. 608. The doctor finally opined that the Loyd's lack of past violent criminal behavior does not necessarily mean that Loyd did not know what he was doing or that Loyd was unaware of the quality of his actions. Scanlon, p. 616.

3. *Testimony of Dr. Andrew J. Sanchez, Jr.*

Dr. Sanchez testified that he did not agree with the Feliciana diagnosis of sociopathic personality, but he admitted that the rape, sodomy and murder of a three-year

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[39] Mr. Poche testified at the 1985 Setencing Trial that Loyd beat him in a game of pool immediately prior to the crime. *See* Transcript of 1985 Sentencing Trial, p. 251, line 23. The state used this testimony to support its position that Loyd was not in a delirious condition at the time he committed the crime.

old child in and of itself is antisocial behavior. Sanchez, p. 807. Sanchez also agreed with Scanlan's opinion that Loyd was suffering from a seriously disturbed state of mind when the crime was committed. Sanchez, pp. 761, 785. The doctor stated that Dr. Honor's report about the possibility of organic brain dysfunction was "plausible" and that Loyd possibly "could" have some organic brain dysfunction. Sanchez, p. 785. The doctor did not do any testing for organic brain disorder; instead he based his conclusions upon Dr. Honor's theory. Sanchez, p. 785.

This court notes that Sanchez, as well as Scanlon, did not find any evidence of frontal lobe dysfunction in their own examinations. Both Sanchez and Scanlon relied upon Honor's theory of brain damage. Honor's finding, however, is not significantly different from the Feliciana Report's suggestion of brain damage, or from Dr. Cox's finding of possible minor brain damage.

Sanchez agreed with Scanlon that Loyd "probably at times during that period in which I think he was having a psychotic episode did not know right from wrong. ... and this is a — that's why I said there was diminished capacity to know right from wrong." Sanchez, p. 766, 777. Sanchez admitted, however, that it is common for psychiatrists to differ on their opinions as to whether or not a person knows right from wrong at the commission of a crime. Sanchez, p. 803. Moreover, Sanchez admitted that it was impossible for him to know definitively whether Loyd knew right from wrong at the moment when the murder was committed. Sanchez, p. 804.

Sanchez opined that the following stressful factors contributed in a cumulative manner to Loyd's mental state at the time of the crime: (1) history of trauma to Loyd's head; (2) sexual and physical abuse as a child; (3)

alcoholic father; (4) that he was forced into a sexual involvement with one of his mother's friends, (5) a virus that Loyd had three weeks before the crime; (6) Loyd's physical exhaustion from his job; (7) hyperthermia; (8) alcohol/substance abuse; and (9) personal disappointments, such as not getting a home loan. Sanchez, pp. 768-70, 805.

The State District Court found, and this court agrees, that Sanchez's testimony as to the mitigating circumstances surrounding Loyd's commission of the crime, as well as the testimony of Drs. Honor and Scanlon, is based largely on facts which were not proven at trial or at the Evidentiary Hearing. Even if an investigator had been hired, it is uncertain that an investigator would have been able to prove the allegations. Furthermore, not a scintilla of evidence was presented at the Evidentiary Hearing to establish these facts. As such, the testimony of Loyd's new experts is speculative since it is premised upon unproven factual allegations. This court thus concludes that Loyd cannot prove prejudice from the testimony of these experts since the expert testimony is not reliable due to the lack of corroboration as to the underlying factaul circumstances. This court also finds that Sanchez's diagnosis of the factors which contributed to Loyd's commission of the crime did not link Honor's theory of organic brain dysfunction to Loyd's actions.

The doctor further opined that Loyd was suffering from a "major mental disorder" at the time he committed the crime (Sanchez, p. 761), such that Loyd's knowledge "of right from wrong was significantly impaired if we could believe the records." Sanchez, p. 762. Sanchez qualified this diagnosis by stating that "I think there was a probability that he at times knew right from wrong and other times during [the commission of the crime] that he did not know right from wrong." Sanchez, p. 772. Sanchez further

pointed out that "[i]t is difficult to reconstruct enough medical evidence to say for the whole period of time that evening he did not know right from wrong. We just—I can not go that far." Sanchez, p. 777 (emphasis added).[40]

On cross examination, Sanchez admitted that Loyd's actions of disposing of the child's body and clothing, and disposing of the mother's purse were indicative of rational thought processes. Sanchez, p. 807. Sanchez also stated that Loyd's remorse after the crime indicates "at some level there was operating some aspect of his mental functioning to suggest that he had done something terribly wrong and was feeling horribly guilty." Sanchez, p. 825.

In rebuttal to the experts offered on behalf of Loyd, the State called Drs. Cox, Ritter, and St. Martin at the Evidentiary Hearing, as discussed below.

4. *Testimony of St. Martin*

St. Martin testified, consistently with his Report, that Loyd was "very cooperative, a very remorseful individual" who exhibited absolutely no impairment of his memory and showed no evidence of mental or psychological disorder. St. Martin, p. 5 (Evidentiary Hearing, March 17, 1988). Additionally, Loyd was not psychotic at the time he committed the crime. St. Martin, p. 21. The doctor pointed out that Loyd did not have any hallucinations, and "his memory did not seem to be impaired." St. Martin, p. 5. St.

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[40] Sanchez's testimony in regards to whether Loyd knew right from wrong is actually more relevant to the issue of whether Loyd was innocent of the crime by meeting the McNaughten Rule insanity defense. As such, this testimony is not directly relevant to the issue of statutory mitigating circumstances, but the court finds it necessary to discuss the totality of the expert testimony in order to evaluate Loyd's attempt to prove prejudice under *Strickland*.

Martin, along with all of the other experts in this case, was aware of Loyd's terrible family history and traumatic childhood since St. Martin was the Loyd family doctor for several years. St. Martin, pp. 9-16.

St. Martin concluded that Loyd knew what he was doing at the time he committed the crime. St. Martin testified:

> Well, it was not only that [Loyd's remorse as evidence that he knew right from wrong]. It was the whole, that information, how he was feeling, wasn't hallucinating, his general psychological condition at the time, and the things that he was able to do at the site of the crime and after the crime was that he knew that what he was doing. I took all that into consideration. Whereas [he] covered the body, destroyed the purse in a different area, you know. The different things that happened in the crime lead me to believe that he knew what he was doing. Plus he told me, and then he was sorry. St. Martin, p. 19.

St. Martin further testified regarding the antidepressant given to Loyd while at Feliciana. Loyd has seized on this fact as proof that someone thought he was psychotic at the time of the crime since the drug is usually given for psychosis. Dr. St. Martin testified that while mellaril is often given to psychotics, it can also be used to treat depression associated with anxiety. "If the depression has a lot of anxiety along with it frequently it's [mellaril] used. And if we have a straight forward only, depression then antidepressant drugs are used. And sometimes we use them in combinations." St. Martin, p. 27, and 39. When asked by Loyd's attorneys if the mellaril masked any psychotic symptoms, St. Martin stated: "I don't think it masked anything because [the drug was never administered] in real

high doses. Because I don't, we didn't find anything to mask other than anxiety and some depression." St. Martin, p. 42.

This court finds that while Loyd has demonstrated that mellaril is used to treat psychotics, Loyd has produced no evidence at all, not even by his own experts, to indicate that St. Martin's prescription of Mellaril to Loyd proves that Loyd was psychotic. As such, this court accepts the uncontroverted testimony that St. Martin used the drug to treat Loyd's depression and associated anxiety, and that St. Martin did not find that Loyd was psychotic at the time he administered the drug. Notably, Dr. Ritter also testified that the drug was not given to Loyd because he was psychotic.

5. *Testimony of Dr. Kenneth Ritter*

On February 4, 1988, Dr. Kenneth Ritter was called to testify at the Evidentiary Hearing. Ritter examined Loyd three weeks after the crime, while St. Martin examined Loyd on the day Loyd was arrested for the murder. Ritter, p. 55. Ritter believes that Loyd was "able to appreciate the usual natural and probable consequences of his acts, that he was able to tell the difference between right and wrong, and, therefore, in our opinion, that he was sane at the time of the alleged crime." Ritter, p. 33. Ritter stated that he studied the police reports as part of his diagnosis (Ritter), pp. 36-38), and he noted that Loyd passed a field sobriety test given to him directly before he committed the crime, Loyd was not suffering from any amnesia after the crime, and that Loyd was aware of what he had done. Ritter related that Loyd lamented to him after the crime, " 'What I done to my family.' " Ritter, p. 37, p. 58. The doctor found that Loyd's statement indicated that he did not have true amnesia. Ritter, pp. 37-8.

Additionally, Ritter found no evidence of a psychotic episode. Ritter, p. 38. The doctor opined that Loyd was not in a delirium at the time of the crime (Ritter, p. 41), and there was no evidence of schizophrenia or manic depressive disease. Ritter, p. 61. The doctor concluded that while Loyd's actions were not rational, he was indeed sane. Ritter, p. 77.

When asked whether Phenothiazine (the ingredient in the drug Mellaril given to Loyd while at Feliciana) is used to treat psychotics, Ritter explained the purpose of the drug as follows: "Primary purpose originally was to enhance the affect of pain relievers in cancer patients, that's the, that's the first thing. We got it later. It does, it is now prescribed most often for mental disturbances, it can also be neurotic as well as psychotic." Ritter, p. 62 (emphasis added).

Ritter also pointed out that "there are ten thousand tests that could be run on everybody, including yourself and me. The difficulty here is that we, that you do things that are indicated. And I think everything that was indicated in this matter was done." Ritter, p. 71. The State also showed Ritter Loyd's voluntary statement which Loyd executed after the commission of the crime. Loyd said: "I had intercourse with the victim, I panicked and took the victim along side the canal, along side the road, and forced her face into the mud and water and held her under until she quit struggling and breathing." Ritter, p. 84. The State then asked Ritter whether that description of events indicated any mental disease or defect. Ritter responded, "Not, not from the standpoint of the sanity at all, no. His thinking apparently was clear at the time, that he knew what he was doing." Ritter, p. 85.

6. *Testsimony of Dr. Cox*

Dr. Cox testified on the same day as Dr. Ritter, Cox stated that he did not think Loyd was suffering from an antisocial personality disorder, and that Loyd exhibited no evidence of psychotic symptoms while at Feliciana. Cox, p. 95. Cox also testified, consistently with Dr. Honor, that there was a possibility of minor brain damage. Cox, p. 100.

Cox opined that there was a possibility that Loyd has some sort of psychosis at the time he committed the crime, but he stated: "in my opinion the probability was not great, it was small." Cox, p. 102. As for Loyd's claim of amnesia, the doctor stated that Loyd told him that Loyd's original lawyers instructed him not to discuss events with the psychiatrists who were examining Loyd. Cox, pp. 106-07. As such, Cox doubted the veracity of Loyd's alleged amnesia. Cox stated that "[Loyd] indicated to me that he had been instructed to not give information by his attorney, Mr. Hackman." Cox, p. 112.

7. *Testimony of Dr. Fain*

The state also called Dr. Fain, who testified that Loyd was cognizant of the wrongness of his actions at the time of the crime, and that Loyd had no mental disease or defect. Fain, p. 121- 122. As for possible brain damage, Fain discovered none. "[T]here was nothing there apparently that was consistent with what you'd call brain impairment, major brain impairment." Fain, p. 125.

Dr. Fain also testified in regards to the MMPI that Loyd took. Fain stated that it was "fairly obvious" that Loyd was malingering when he took the test. Fain, p. 136. Loyd's malingering explains the extended period of time he took to complete the test. Fain explained that Loyd

presented "himself as being more mentally disturbed than was the case was in the data." Fain, p. 137.

ANALYSIS OF THE TESTIMONY

In evaluating the plethora of psychiatric evidence in this case in the context of whether Loyd has affirmatively proven prejudice, the court reiterates that significant psychiatric statutory mitigating evidence had been presented on Loyd's behalf at the 1985 Sentencing Trial. This evidence is discussed in depth earlier in this Opinion, and will not be re-presented here.

Since Dr. St. Martin and two psychiatrists were called on Loyd's behalf at the 1985 trial, the inquiry must be whether Loyd's new team of experts presented psychiatric evidence that is significantly different in nature such that Loyd has affirmatively proven prejudice for the purposes of his ineffectiveness claim. This court concludes based on the evidence presented, to the extent that Drs. Honor, Scanlon, and Sanchez would have presented mitigating psychiatric testimony on behalf of Loyd, that their testimony is clearly not fundamentally different from that of the original experts. This testimony is to a great extent based on unproven allegations and is largely cumulative of the testimony already presented. To the extent these new experts use different terms of art, this court concurs with the State District Court that the presentation of this evidence does not lead to a "reasonable probability" that "the result of the proceeding would have been different." *Strickland*, 104 S. Ct. at 2068.

It is undisputed that the jury heard mitigating evidence of Loyd's mental condition. As discussed earlier in this Opinion, Loyd's attorneys called Drs. Cox, Ritter, and St. Martin who testified in detail about Loyd's

traumatic childhood and his severe emotional problems. The testimony of Loyd's new experts is simply not that different from the testimony already presented to the jury. This situation is not one where the defendant had no psychiatric mitigating evidence presented on his behalf. Loyd's counsel at the 1985 Sentencing Trial presented a significant amount of testimony on Loyd's behalf, and the *State called no rebuttal witnesses to challenge the statutory mitigating evidence presented by Loyd's attorneys.* As such, this court finds absolutely no evidence to support Loyd's implicit argument that there was no substantial evidence presented to the jury regarding Loyd's emotional problems and traumatic experiences.

While the testimony of Drs. Honor, Scanlan and Sanchez partly described Loyd's mental state with different terms and labels and under different mental theories than the terms used by Drs. Cox, St. Martin, and Ritter, the court notes that the United States Supreme Court has pointed out that psychiatry is an inexact science, and psychiatrists commonly disagree among themselves on matters concerning mental illness. *Ake*, 105 S. Ct. at 1095.

While all of the experts used different terminolgy to describe Loyd's mental condition, all of the experts testified that the following factors contributed to Loyd's behavior at the time of the crime: Loyd was physically abused as a child; Loyd may have hit his head as a child; Loyd had problems in the Navy; Loyd had an absence of stable heterosexual relationships in his life; Loyd had a history of substance abuse and may have been under the influence of alcohol and/or drugs immediately prior to the offense; Loyd may have suffered from personal stresses, sleep deprivation and job-related hyperthermia immediately prior to the crime; and Loyd suffered memory loss following the crime. (The court notes that Dr. Cox stated

that he disbelieves that Loyd suffered any memory loss since Loyd told him that attorney Hackman told Loyd not to cooperate with the psychiatrists.) Additionally, all of the experts agreed that Loyd was remorseful after the crime. Therefore, to the extent that the jury heard substantially the same testimony from Drs. Cox, St. Martin and Ritter that the jury would have heard from Drs. Honor, Scanlan or Sanchez, there is no reasonable probability that Loyd's sentencing verdict would have been different had counsel retained and called Honor, Scanlan or Sanchez.

In reaching the conclusion that Loyd has not affirmatively proven prejudice, the court must examine all of the evidence that the jury considered at the trial. At the Sentencing Trial, the sheriff testified as follows:

> ...I asked Captain Fuselier, "Did you advise Mr. Loyd of his rights?" He said yes, he did. I said, "How about doing one more time where you will have a witness with me in the front seat." Captain Fuselier advised him of his rights once again inside the police car and we was traveling west on 61 in the direction of Garyville. Captain Fuselier asked him, "is it possible for the little girl to still be alive?;; [Loyd] said, "there is no way that she can be alive." And I said, "are you sure that she is dead?" And Captain Fuselier asked the same question. [Loyd] said, "I am positive she is dead," he said, "I held her face under the water in a ditch until bubbles quit coming up out of the water." And he said, "And I held her down until her body quit moving." And he said, "I know she was dead and I took her out of the water." Captain Fuselier said, "Did you rape her?" He said, "*I jugged her twice.*" *See* Sheriff's Testimony at Sentencing Proceeding, May 8, 1985, Sentencing Transcript, Vol 4 of 6, pp. 98-99.

The State also called the pathologist who performed the autopsy on the dead child. The pathologist described to the sentencing jury that: the child victim had muddy water and bloody foamy fluid in her nose and mouth; she had many injuries over her face, neck, scalp, back and buttocks; her lips were bruised and her mucus membrane was torn inside her mouth; she suffered pain and many of her wounds were of the defensive type; she had deep tears in the opening of her vagina; her rectum was distended, stretched and torn; and semen was found in her rectum. Photographs of the child's mutilated body were admitted into evidence and shown to the jury to corroborate the pathologist's testimony. The pathologist concluded that the child had been beaten, forcibly raped both vaginally and rectally and then drowned. *See* Testimony of Dr. Paul McGary at Sentencing Proceedings, May 8, 1985, Sentencing Transcript, Vol. 4 of 6, pp. 123-42.

In the jury's recommendation of death, the jury found the following aggravating circumstances:

> The offense was committed in an especially heinous, atrocius, or cruel manner; and
>
> The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping. *See* Jury's Recommendation, Sentencing Transcript, Vol. 1 of 6, p.112.

This court finds that the State's evidence presented at the sentencing trial was not just substantial but it was overwhelming, undoubtedly leaving a deep impression on the jury. This court concludes, even if Loyd's counsel had retained a psychiatrist to offer further mitigating evidence in addition to the statutory mitigating psychiatric evidence offered by Drs. Cox, St. Martin, and Ritter, that "[g]iven the overwhelming aggravating factors, there is no

reasonable probability that the omitted evidence would have changed the conclusion" of the jury that Loyd should be sentenced to death. *Strickland*, 104 S. Ct. at 2071. *See also, Willie*, 737 F. 2d at 1394-95; *Celestine*, 750 F. 2d at 356-58; *Martin v. McCotter*, 796 F. 2d 813, 818-19 (5th Cir. 1986), *cert. denied*, 479 U.S. 1057 (1987); *James v. Butler*, 827 F.2d 1006, 1016 (5th Cir. 1987), *cert. denied*, 486 U.S. 1046 (1988).

Since this court concurs with the legal conclusion of the State District Court that Loyd had not affirmatively proven prejudice in his claim of ineffective assistance of counsel. Accordingly;

IT IS ORDERED that the Petition of Alvin Scott Loyd, for Habeas Corpus Relief on the Basis of Ineffective Assistance of Counsel, should be and is DENIED.

This court notes that the State Court held a seven-day evidentiary hearing and specifically finds that a further evidentiary hearing is not warranted, would only be cumulative and would add nothing but further delay to these proceedings.

The court, however, issues a Certificate of Probable Cause (CPC). The court resolves its doubts whether a CPC should be issued in favor of Petitioner because: (1) issuance of a CPC is a jurisdictional prerequisite for appeal (*Jones v. Warden*, 402 F. 2d 776 (5th Cir. 1968)): and (2) Loyd has demonstrated that some of the issues raised in his federal Petition "are subject to debate among jurists of reason" (*Byrne v. Butler*, 845 F. 2d 501, 505 (5th Cir. 1988) *citing Barefoot v. Estelle*, 463 U.S. 880, 893 fn. 4, 103 S. Ct. 3383, 3394 fn. 4 (1982)); and (3) Loyd need not show that he would prevail on the merits. *Id.* Accordingly;

IT IS FURTHER ORDERED that Loyd's Stay of Execution remain in effect pending timely appeal.

New Orleans, Louisiana, this 10th of October, 1990.

/s/ Illegible

UNITED STATES DISTRICT JUDGE